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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 701—OCTOBER TERM, 1955

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL, APPELLANT

v.

CLARICE B. COVERT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 713—OCTOBER TERM, 1955

NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN, ALDERSON, WEST VIRGINIA, PETITIONER

v.

WALTER KREEGER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR APPELLANT AND PETITIONER ON REHEARING

GENERAL POSITION OF THE GOVERNMENT

We do not undertake in this supplemental brief to reargue matters already covered in the other briefs

filed in these cases. This brief considers only those points on which the Court invited discussion in its order of November 5, 1956, granting the petition for rehearing. 352 U. S. 901. At the outset, however, for the convenience of the Court, we restate briefly our general position on the constitutionality of Article 2 (11) of the Uniform Code of Military Justice and indicate how the points discussed in this brief bear on that analysis.[1]

It is basic to all problems in this case to recognize that, since Article 2 (11) relates to civilians accompanying the armed forces into territory over which the United States is not sovereign, the problem cannot be considered in terms of United States law alone; even in its military aspects, it is a problem of the power of the United States in international relations. This is to some degree even more true in time of peace than in time of war. When the United States is waging war, and particularly when in that process its troops are in enemy territory, it is acting under its own power to wage war. But United States troops and their civilian components cannot, in time of peace, even be present in the territory of a foreign power without the consent of that state. The right of this country to transport, house and control both its troops and the civilian components thereof stems from international law, negotiation, and agreement.

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[1] See, also, for a brief general statement of our position, the Memorandum in Reply to Petition for Rehearing, filed in October 1956.

On this foundation, we believe that the court-martial jurisdiction of civilians accompanying the armed forces into foreign territory may be sustained on two independent (although interrelated) constitutional grounds—(1) as a reasonable and proper exercise of the powers of the United States in the conduct of foreign affairs, and (2) as a reasonable exercise, in the light of the practical position of military dependents and employees in foreign territory, of the power conferred by Article I, section 8, clause 14, of the Constitution to make rules for the government of the land and naval forces.

1. Under international law each nation has jurisdiction over offenses committed within its own territory. The United States can exercise adjudicatory power on foreign soil only when and to the extent that the foreign nation consents that the United States may do so. Under these circumstances there is the initial question whether every American over whom the United States has acquired adjudicatory power outside the continental limits of the United States must be indicted by a grand jury and tried before a jury by an Article III court. This Court has held (*In re Ross*, 140 U. S. 453) and petitioner has conceded that they need not.[2] The Constitution does not

[2] The difference in circumstances between those of the consular courts upheld in *In re Ross* and those of courts-martial today certainly does not affect the underlying holding that, where American judicial power is exercised abroad, it may be done through means other than an Article III court. In fact, if the strict requirements of an Article III court were not applicable where the United States had greater freedom of action, as in the

require trial before an Article III court in a foreign country for offenses committed there by an American citizen. Congress may establish legislative tribunals to exercise whatever jurisdiction the United States may have to try such Americans abroad.

So much would appear basic and almost beyond dispute. The precise question before the Court, therefore, is whether, when the United States has obtained from a foreign country the right to try its national on foreign soil for a crime committed on foreign soil, that right may be implemented through the existing court-martial system in relation to civilians accompanying the armed forces. We believe that nothing in the Constitution—no particular clause and nothing in its structure or spirit—prohibits the selection of a military tribunal for such civilians simply because it is military in character. The historical evidence discussed below bears on this, as well as the history discussed in our other briefs showing that some civilians have always been recognized as subject to military discipline. The question is solely whether the legislative judgment in selecting the particular tribunal was reasonable in the circumstances.

It is our view not only that the choice of a military tribunal is intrinsically reasonable for such persons, but that, in the practical realities of present day in-

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Ross days, those requirements would seem even less applicable today when the United States cannot decide by itself what kind of a court to establish abroad but must negotiate with other sovereign governments the terms on which military bases may be established and who will be responsible for maintaining discipline, law and order among the Americans who enter the country in connection with those bases.

ternational relations, the only possible trials under United States law are military trials. The practical necessities and the unavailability of alternatives, which are discussed in this brief, demonstrate, we believe, the ample reasonableness of the Congressional judgment.

On the other hand, if our Constitution should be deemed to prevent the United States from taking advantage of the concession which host countries are willing to make, and have made, to military authority in view of the military responsibility for the whole visiting unit, the United States to that degree would have tied its own hands in making joint military arrangements with other nations. The historical evidence shows, we suggest, that the framers of the Constitution were too well aware that unforeseen contingencies might arise in the defense of the United States to hobble with such restrictions the army of the Republic, which they made subject to full control by the national legislature.

2. Article 2 (11) of the Uniform Code may also be sustained under Article I, section 8, clause 14, of the Constitution, conferring upon Congress the power to make rules for the government of the land and naval forces. The historical evidence discussed below shows that this power, like other enumerated powers, is subject to the necessary and proper clause and was considered broad and flexible to meet changing circumstances. The power to subject civilians closely related to the armed forces to court-martial jurisdiction is not a radical change from concepts with which the

framers of the Constitution were familiar. It is conceded, in fact, that the power to make rules for the government and regulation of the land and naval forces includes the power to subject civilians to court-martial jurisdiction under certain circumstances. The question is whether that power should be measured by the circumstances of the eighteenth century or of the twentieth century. Our answer is that the extent of the admitted constitutional power to make some civilians subject to court-martial jurisdiction must be judged by what is necessary and proper under the conditions of today.

In our view, civilians accompanying the armed forces overseas are now as much, if not more, an integral part of the land and naval forces as were camp followers and sutlers in the field at the time the Constitution was adopted. The practical considerations discussed in this brief demonstrate the extent to which the entire visiting contingent is in fact one unit for which the military commander is responsible abroad. And if the military commander has the responsibility—to the foreign country, to the United States, and to the individuals within his command—he must have the general power of supervision which is a concomitant of responsibility. To be effective this power of control must be exercised promptly and locally, and neither trial by the courts of the foreign state nor trial in the United States will solve the problem of military responsibility divorced from authority.

In short, it is our position that in terms of twentieth century defense needs, where large contingents

must be stationed abroad for extended periods of time, civilians accompanying the armed forces are an integral and necessary part of the armed forces overseas for whom the military commander in the area is responsible; and that they are therefore properly subject to the rules for the government of the land and naval forces.

SUMMARY OF ARGUMENT

I

A. The practical necessity for court-martial jurisdiction over civilians accompanying the armed forces into territory over which the United States is not sovereign may be simply stated. The whole visiting contingent—soldiers, sailors, airmen, civilians, and dependents—is in the eyes of the host state and in terms of the military needs of the United States one unit, for the conduct of which the military commander, who represents the effective power of the United States in the area, is responsible. This is recognized in the NATO Status of Forces Agreement, where the United States has by treaty assumed the obligation to take necessary measures to assure that its whole contingent conforms to certain standards of conduct. The military authorities must therefore have power of control over the whole unit concomitant with their responsibility for the whole unit.

The Congressional judgment reflected in Article 2 (11), that control over the entire visiting contingent is necessary, is supported by the actual experience in the field. Defense Department solicitation of the

views of commanders in overseas areas has elicited the unfailing response that ability to perform the assigned mission would be seriously impaired if jurisdiction over accompanying civilians is lost. The terms under which accompanying civilians are allowed to enter the host state, the conditions under which they live—sometimes in a virtual enclave—the necessity for providing for their health and welfare, all serve to interweave their activities with those of the military. The responsibility which overseas commanders must assume under these conditions cannot be divorced from power to supervise and control the whole group.

B. Effective control over civilian members of the visiting unit cannot be exercised without criminal jurisdiction. Overseas commanders meet the heavy responsibilities imposed upon them by promulgation of orders, regulations, and other directives applicable to the personnel of their commands, military and civilian. The power to enforce these directives promptly and locally by punishment, when necessary, is essential. If civilians may disobey directives without being subject to the punishment which could be imposed on the soldier in the same house, or at the next desk, manifest injustice would result.

All kinds of violations by the civilian part of our military contingents overseas, whether they result in the murder of a soldier, the neglect of security regulations, the introduction of narcotics, or black-marketeering, can affect the defense needs of the United States and the acceptability of our military contingents as visitors in a foreign land. It is a basic prem-

ise of our law that power to impose fines and imprisonment is the most effective means of deterring infractions. The overseas commanders need to have that power available promptly and on the spot, if they are to carry out their duties.

C. Assuming that alternatives to court-martial jurisdiction were legally and politically available,[1] they would not provide the prompt and effective supervision which the practical necessities require.

A commander responsible for the whole unit should not be expected to rely upon foreign authority and foreign courts to carry out the responsibility which the host country has indicated to be that of the United States, and which the United States has assumed. Where injuries are to United States nationals by United States nationals, foreign authorities could not be expected to be as interested in prosecution as our own officials. Moreover, trial in a foreign court would not solve the problem of violations of law and military regulations which are not offenses under the law of the foreign state. In particular, security violations would not be subject to foreign trial. The commander's responsibility for the security of his base requires the imposition of discipline under United States law.

Trial in the United States, if it were possible, is no adequate solution to the problem of responsibility. For many crimes, particularly those relating to military regulations, only prompt and local punishment

[1] The legal and political availability of such alternatives is discussed in Point II, *infra*.

would be effective. The difficulties inherent in a delayed trial in a distant place make it almost inevitable that only the most gross infractions would be punished, and even as to such cases, there is no assurance that distant prosecution would be possible.

The real alternative to court-martial jurisdiction would probably have to be to prohibit dependents and civilian employees from accompanying the armed forces overseas. This would have a serious adverse effect on our ability to meet our defense needs.

D. Since the whole contingent is one unit for which the military commander is responsible, there is no valid distinction, for purposes of court-martial jurisdiction, between civilians employed by the armed forces and civilian dependents.

The sum of our discussion is that the decision whether civilians overseas are a necessary part of our armed forces, and whether practical necessity requires that they be subject to military authority, is primarily one for the executive and legislative branches of the government. Their combined judgment is reasonable and is clearly not so without rational basis that this Court should overrule it.

II

Any discussion of the alternatives that might be available to court-martial jurisdiction of civilians accompanying the forces overseas starts with the fact that for most offenses there are *no* alternatives except by the consent of the foreign government concerned. Consideration of what might be available thus amounts

to an attempt at prognostication in the field of foreign affairs. On the basis of existing treaties, particularly the NATO Status of Forces Agreement, and present attitudes of foreign governments, our guesses as to available alternatives are as follows:

A. As to offenses over which the receiving (or host) state has concurrent jurisdiction, the only alternative to court-martial jurisdiction over American civilians overseas which can reasonably be anticipated is trial by the foreign state under its laws and in its courts. The receiving state has not relinquished its jurisdiction over such offenses. It has merely recognized a primary right in the United States to exercise jurisdiction in certain categories of cases.

The cession has thus far been made only to military authorities in recognition of the fact that the civilian contingent is in a practical sense part of the whole visiting military unit. It is doubtful that cession would be made to any other type of United States jurisdiction. There is a historical tradition in many countries that the country of a visiting force is permitted to exercise jurisdiction over its troops under its own law. It is therefore not a radical departure to cede to military authorities jurisdiction over the civilian components of the same armed force. To grant any other form of adjudicatory power would, on the other hand, be either a serious break with tradition or a return to outmoded concepts of extraterritoriality. For instance, the alternative of a civilian trial by the United States in the foreign

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country is not feasible. Any request for such jurisdiction could not avoid the implication that a fair trial would not be available in the courts of the receiving state. It would too closely resemble the former, outmoded, unilaterally imposed, capitulations to be readily acceptable.

It would also probably be impolitic for the United States to seek, and it is doubtful that the host country would grant, the right to try in the United States a crime committed in the territory of the host state which is a crime under the law of that state. The United States for itself has insisted that trials by visiting forces of persons subject to their jurisdiction for crimes committed here shall be in the United States. Moreover, even should some governments agree that a military dependent could be removed, the alternative of a civilian trial in the United States is not readily available. Unless they are violations of the Uniform Code, such crimes as murder committed in a foreign country are not now crimes punishable by the United States. There would be substantial problems in adopting American legislation which would cover the foreign conduct necessary to be covered in order to maintain order and discipline on military bases abroad, but which would not go too far.

This type of offense against both laws, for which only foreign trial would be the likely alternative, covers a very substantial portion of the crimes for which, under Article 2 (11), civilians accompanying the armed forces may be tried by court-martial. Many offenses which might seem to involve only

United States military regulations, such as black-marketeering, may also involve violations of local laws, such as those relating to customs and taxes. There would inevitably be many cases of insistence upon local foreign trial if the United States military authorities were powerless to try civilians.

Here again, Congress was entitled to make the judgment, which seems to reflect the views of the American public generally, that American civilians accompanying the armed forces overseas ought, if possible, to be tried under the only American law available—American military law—rather than foreign law. It is not a reflection on the standards of other countries to recognize that unfamiliarity with foreign procedures, and the frequent necessity of acting through interpreters, would result in hardship. Also, in many countries, the protection against self-incrimination, the right to cross-examine, and other safeguards, are not the same as in the United States. Civilians who go overseas as part of the military contingent overseas can reasonably and properly expect to have the benefit of as much United States law as do the military.

B. As to offenses which are not crimes under the law of the foreign state, but which are crimes only under United States military law, the alternative to court-martial jurisdiction is, in all probability, no trial at all. Since they are not offenses under the law of the receiving state, they are not triable by the receiving state. Most of these offenses, such as violations of regulations, are not now offenses under the general criminal laws of the United States.

This type of violation must be dealt with effectively and on the spot. The only alternative to trial by court-martial that could be at all effective would be to make the offense a civilian crime under United States law and provide some United States tribunal to try it in the foreign country. However, as suggested above, present day national feelings do not allow a regular system of civilian courts to try American civilians in foreign territory (even for crimes against United States law alone) to be considered a reasonably foreseeable alternative.

C. There is one, special, limited group of offenses, not involved in the cases now before the Court, where civilian trial in the United States can be said to be possible at the present time, *i. e.* extraterritorial offenses against the government of the United States under the doctrine of *United States* v. *Bowman*, 260 U. S. 94. We may assume that for very serious extraterritorial offenses, such as treason, civilian trial in the United States, now available, would be used. But thus far, the only cases of such crimes against the United States which have been tried by court-martial are comparatively minor cases of fraud and bribery. The necessity, from the standpoint of command, of the power to deal promptly and on the spot with such infractions, the disadvantages both to prosecution and defense of trial in a distant place, and the possibility of escaping punishment where extradition is not available, all make civilian trial in the United States an impractical alternative, even for this type of crime.

III

A. Article I, section 8, clause 14, of the Constitution, empowering the Congress to make rules for the government of the land and naval forces, is properly read in conjunction with the necessary and proper clause to constitute a broad grant susceptible of expansion under changing circumstances. Although the framers had a background of hostility by the people to the army of the King, they made a deliberate decision to deal with the problem, not by the kind of limitations which had been sought from the King, but by placing the army under Congressional control, subject to the will of the elected representatives of the people. Hamilton in *The Federalist* explained that the powers to raise an army and prescribe rules for the land and naval forces "ought to exist without limitation; because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them."

It was therefore clearly contemplated that the power to make rules for the government of the land and naval forces would be subject to expansion and development under the necessary and proper clause. Clause 14 was not tied to a confined and rigid compass. For instance, if the power to make rules for the government of the "land and naval forces" were a term of fixed content, incapable of expansion beyond the precise jurisdiction known to the framers, there would be no power in Congress to provide rules for the government of the air force. The power to provide com-

martial jurisdiction of civilian contingents accompanying the armed forces into foreign territory, under present-day conditions, is not different in character.

B. Article 2 (11) represents an adaptation, to twentieth century realities, of concepts known to the framers. Some civilians were already, at the time of the Constitution, known to be subject to court-martial jurisdiction. Civilians accompanying the armed forces into foreign territory are, for all the reasons previously discussed, as integral a part of our forces overseas as were sutlers and retainers to the camp who were subject to military jurisdiction within the United States at the time the Constitution was adopted.

Certainly, there is nothing in the history of Article I, section 8, clause 14, which would bar Congress from using courts-martial as the legislative tribunals available to implement the right, which the United States obtains from a foreign country, to try under United States law civilians committing offenses which are violations of the law of the foreign state.

IV

The constitutional distinction between major crimes and petty offenses is not a relevant distinction for purposes of court-martial jurisdiction over civilians in foreign territory.

A. Petty offenses, in the constitutional sense, are those offenses which are deemed exempt from the guaranty of a jury trial in Article III and the Sixth Amendment. While the standards applicable to a

petty offense for constitutional purposes are not clearly defined in the decisions, this Court has indicated that both the nature of the offense and the maximum permissible punishment must be considered. For example, the crime of reckless driving, subject to a fine of $100 and imprisonment of not more than 30 days, was held not to constitute a petty offense because of the degree of moral wrong involved. *District of Columbia* v. *Colts*, 282 U. S. 63. In general, petty offenses for constitutional purposes are infringements of local police-type regulations, the moral quality of which is comparatively inoffensive, and for which a relatively minor penalty can be imposed. The penalty actually imposed is not determinative.

While the classification of petty offenses serves as an exemption from the guaranty of a jury trial, it is by no means clear that the same exemption can be read into the provision of Article III for judges having lifetime tenure. Thus far, Congress has made petty offenses triable before non-Article III judges or courts only in areas where it has been held, or where it is arguable, that courts or judges not deriving their power from Article III may constitutionally sit, as in the territories or the District of Columbia. The distinction between petty offenses and major crimes cannot be safely utilized as marking the dividing line between Article III and non-Article III power.

The distinction between major crimes and petty offenses therefore has meaning where Article III applies, or where Article III judicial power does not apply but the Sixth Amendment does (as in the Dis-

trict of Columbia and the territories), only as marking the line of offenses for which there need not be trial by jury. Where neither Article III nor the Fifth and Sixth Amendments are otherwise applicable, the distinction has no significance.

B. We think the classification has no significance to court-martial jurisdiction of civilians accompanying the armed forces overseas because neither Article III nor the specific guaranties (other than due process) of the Fifth and Sixth Amendments apply to trial of offenses by such civilians abroad.

Admittedly, these guaranties do not apply if, as we think we have demonstrated, court-martial jurisdiction is properly conferred here under the Congressional power to make rules for the government of the land and naval forces.

They also do not apply, under the decisions of this Court, to any trials of United States nationals in foreign countries, whatever the source of the tribunals established for such trials. *In re Ross*, 140 U. S. 453. To render the distinction between major and petty offenses meaningful in relation to that problem, the Court would first have to hold; contrary to its prior decisions, that, while legislative tribunals may be used abroad to try civilians for crimes committed abroad, such legislative tribunals are bound by the Fifth and Sixth Amendments as in the District of Columbia. So to hold would represent a radical and unwarranted departure from prior rulings.

As to offenses which are crimes under the law of the country where committed, the basic rationale of *In re Ross* is as valid today as it was at the time of that ruling.

Article III and the Fifth and Sixth Amendments do not apply because the United States has no automatic right to try its nationals for such crimes, but only such right as is conferred by the state having territorial jurisdiction. The real choice is not between a United States trial under the Sixth Amendment and a United States military court; the choice is between trial by United States legislative tribunal (such as a court-martial) under United States law and trial by a foreign court under foreign law.

Even as to crimes which are offenses under United States law alone, this Court has held that trials outside the limits of the continental United States, in our insular possessions, are not subject to the Fifth and Sixth Amendments because the special conditions of those territories rendered those guaranties inapplicable and impractical. For the reasons developed in Point II, *supra*, a system of American courts in foreign countries which could operate within the limitations of those Constitutional amendments is even less feasible.

Nor would it solve the problems arising from the presence of civilian components overseas to have petty offenses triable on the spot by court-martial, and then have all other offenses triable in this country in the courts of the United States. It is questionable whether any country would consent to such a distinction as to major crimes which are crimes under its laws. From the point of view of the United States, it would take radical changes in existing laws to make the concept of petty offenses applicable to military law, and until new legislation was passed, not only would

our present treaties be ineffective, but new negotiations could not be conducted on any firm basis. Other objections to trials in this country are discussed in Point II, *supra*.

Beyond these difficulties, no limitation of court-martial jurisdiction to petty offenses would solve the practical problems of responsibility divorced from authority. From the point of view of the civilian contingent abroad, such a distinction would put a premium on the commission of major rather than minor crimes, in the hope that removal to the United States and trial here would prove to be too burdensome. Congress could reasonably and properly conclude, as it did in Article 2 (11), that all offenses by the civilians should be subject to one law and tried on the spot.

ARGUMENT

In the four Points which follow, we discuss the questions which the Court asked in its order of November 5, 1956, 352 U. S. 901.[1] The first question

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[1] The order provided as follows:

"The petition for rehearing is granted. On reargument counsel are invited to include among the issues to be discussed by them the following matters:

"1. The specific practical necessities in the government and regulation of the land and naval forces which justify court-martial jurisdiction over civilian dependents overseas; the practical alternatives to the exercise of jurisdiction by court-martial.

"2. The historical evidence, so far as such evidence is available and relevant, bearing on the scope of court martial jurisdiction [illegible] Art. I, § 8, cl. 14, and the Necessary and Proper Clause, and bearing on the relations of Article III and the Fifth and Sixth Amendments in interpreting those clauses. In particular, the question whether such historical evidence points to the

is treated both in Point I and in Point II. Point III discusses the second question. The discussion of the third question is included in Point I. The fourth question is dealt with in Point IV. We have attempted not to repeat *in extenso* the arguments or materials set forth in the briefs and memoranda we have already filed in these cases, and for that reason we feel warranted in suggesting to the Court that this brief does not stand alone but should be considered together with the prior arguments we have submitted.

I. COURT-MARTIAL JURISDICTION OVER DEPENDENTS AND CIVILIAN EMPLOYEES ACCOMPANYING THE ARMED FORCES OVERSEAS IS A PRACTICAL NECESSITY BOTH AS A MATTER OF INTERNATIONAL RELATIONS AND TO ACCOMPLISH THE MILITARY MISSION

The Court has invited discussion of "The specific practical necessities in the government and regulation,

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conclusion that the Art. I, § 8, cl. 14, power was thought to have a fixed and rigid content or rather that this power, as modified by the Necessary and Proper Clause, was considered a broad grant susceptible of expansion under changing circumstances.

"3. The relevance, for purposes of court-martial jurisdiction over civilians overseas in time of peace, of any distinctions between civilians employed by the armed forces and civilian dependents.

"4. The relevance, for purposes of court-martial jurisdiction over civilian dependents overseas in time of peace, of any distinctions between major crimes and petty offenses.

"Mr. Justice Reed, Mr. Justice Burton, and Mr. Justice Clark would deny the petition for rehearing. They believe that the problems presented in the above questions, with the exception of No. 4, the answer to which in their opinion is obvious, have been fully presented in the briefs and argument already had. Mr. Justice Brennan took no part in the consideration or decision of this application and order."

of the land and naval forces which justify court-martial jurisdiction over civilian dependents overseas * * *." Such discussion bears on both constitutional bases for supporting the validity of Article 2 (11) of the Uniform Code of Military Justice. On the issue of whether a court-martial is an appropriate legislative tribunal to exercise jurisdiction relinquished by a foreign government, this material demonstrates the reasonableness and wisdom of the congressional action. When considering Article 2 (11) as an exercise of congressional power to make rules for the government and regulation of the land and naval forces, and to make laws necessary and proper in the execution of that power, the practical problems demonstrate the necessity and propriety of the legislation adopted.

A. CIVILIANS ACCOMPANYING THE ARMED FORCES OVERSEAS ARE PART OF A SINGLE CONTINGENT FOR WHICH THE MILITARY COMMANDER IS RESPONSIBLE BOTH TO THE FOREIGN GOVERNMENT AND TO THE UNITED STATES AND OVER WHICH HE MUST HAVE EFFECTIVE CONTROL

The prime practical necessity may be summarily stated. A commander who has responsibilities must be armed with authority to discharge those responsibilities. Civilians accompanying an armed contingent overseas are, in their status in relation to the host country, part of one unified contingent, allowed to be on foreign soil because of the military commitments of the United States in relation to the host country. The commander, who represents the effective power of the United States in the foreign territory, thus has a responsibility in relation to those civilians that he does not have in relation to civilians accompanying the

armed forces in United States territory. In foreign territory, it is the whole contingent which is the representative of the United States, not merely the military part of the group.

Since World War II, the troubled international situation has made it necessary for the United States to deploy its armed forces throughout the world for the protection of our nation and the free world. These forces include a large civilian contingent of dependents and employees, as well as the actual members of our armed forces. This civilian contingent is almost equal in size to the military contingent.[5] Latest Department of Defense figures show that 348,298 civilian dependents[6] and 23,272 American citizen-employees are now[7] stationed in foreign areas where they are subject to military law under Article 2. (11), Uniform Code of Military Justice. More than two-thirds of these civilians are accompanying the Army and the balance accompany the Navy and Air Force.

All these civilians are in foreign countries because the United States needs them there for military

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[5] As of September 30, 1956, there were 745,858 members of the armed forces outside the continental limits of the United States of whom over 500,000 were stationed in foreign countries. In addition there are some 388,000 naval personnel "afloat" some of whom are on ships operating out of foreign ports.

[6] As of January 31, 1956. The Department of Defense breaks this figure down into 330,851 who are dependents of military personnel and 17,447 who are dependents of civilian employees. In this brief, no distinction is made as between the two, the phrases "military dependents" and "civilian dependents" being used for the entire group.

[7] As of September 30, 1956.

reasons. It is a basic postulate that there is a military necessity for our having bases overseas. It is also a basic postulate that the armed forces must have available at such bases the services of civilian technicians and that to maintain morale and recruitment military personnel must be allowed to have their families with them.

The United States is as much responsible to the host country for these civilians as it is for the military contingent. For example, the United States has by treaty agreed to take whatever measures may be necessary to see to it that military dependents who accompany the armed forces into a foreign country live up to certain standards. Article II of the NATO Status of Forces Agreement (Reply Br. 33) sets standards of conduct which are expressly made applicable not only to the forces but to the civilian component and to dependents: they are to respect the law of the receiving state, to abstain from activity inconsistent with the spirit of the NATO Agreement, and to abstain from any political activity in the receiving state. The article provides that it is the duty of the sending state, the United States, to take necessary measures to that end. That there is a practical responsibility as well as a legal one is clear from the type of activities mentioned. Certainly, there would be few countries in which we would long have troops stationed should American civilians accompanying them engage in local political activities.

Immediately responsible for the welfare of these civilians and also responsible for them in the eyes of

the host state is the American commander in the area. In view of the desire for factual information evidenced by the Court's question, the Department of Defense solicited from overseas commanders their views concerning the necessity for court-martial jurisdiction. Without exception, these commanders state that discipline would be disrupted, morale impaired, and ability to perform the assigned mission reduced if jurisdiction under Article 2 (11) is lost. Some of the replies are printed as Appendix A to this brief (pp. 97-129, *infra*). The basic theme running through all the replies is that responsibility cannot be divorced from effective power to control. The very willingness of foreign governments to allow United States troops within their territory may depend upon the ability of the military commander to maintain order and discipline over these civilians within his command. To hold that the United States did not have the constitutional power to give its military commanders authority over military dependents and employees overseas would make some foreign governments less willing to accept United States contingents in their territory and to this extent would weaken the military defense of the United States and the free world.

It has been argued, however, that civilian dependents are no more a part of the military in overseas areas than they are in this country. This is not true. All civilians who accompany the armed forces overseas are so closely identified with those forces as to be indistinguishable from them for all practical pur-

poses. In addition to being transported overseas at government expense, such civilians are supplied passports which identify them as employees of the armed forces or as dependents. They are admitted to the country in which they live without a visa because the particular armed force vouches for their behavior. They use military payment certificates, the armed forces' medium of exchange, and they have the benefits of the special armed services postal facilities, which are not available to Americans traveling abroad as tourists or on business. The benefits of this postal system include reduced overseas postal rates, special customs privileges, and availability of money order and other services of the Post Office Department. Accompanying civilians enjoy the same tax exemptions, customs benefits, and border crossing privileges as the uniformed members of the services. Both are permitted to import automobiles without tax in many countries where importation is strictly forbidden to others. Accompanying civilians receive medical and dental treatment at armed forces' hospitals and dispensaries, and in event of death mortuary services are provided. Schools are maintained at government expense for all children of the military community without regard to whether their parents are soldiers or civilians. Churches, theaters, clubs, tours, and sporting and cultural events are shared by civilian and military members of the military communities overseas. Members of the civilian contingent are housed by the military. They are furnished heat, light, fuel, water, telephone and other services. They ride in military

transportation, and their food, clothing and other necessities are available from sources maintained by the armed services. Special banking facilities, provided for the services, are utilized by these civilians, who also share with the military the protection of the military police. In many areas the forces make gasoline, oil, and parts available for private automobiles, and maintain service stations and garages. Also, in many areas they issue automobile license plates and drivers' licenses to military and civilian members of the community; and supervise the issuance and administration of automobile insurance for them.

These, as well as other factors, closely identify these civilians overseas with the armed forces. In every essential of their daily living their activities are interwoven with those of the military. Because they are so closely identified with the armed forces, the local populace in the various foreign areas look upon and identify these civilians only as members of the American military community. In most foreign countries, military personnel wear civilian clothes off the base. To the local population civilians and military are indistinguishable. As a corollary, the local populace naturally—and rightly—expects the military commander to supervise and control this civilian contingent. Without the power of disciplinary action over these civilians, the commanders' efforts to maintain the smooth community relationships necessary to successful fulfillment of his mission in a foreign land would be seriously impaired.

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Our overseas commanders have the basic, primary responsibility of maintaining the armed forces in a state of combat readiness to meet any eventuality. They have the further responsibilities of serving as good-will ambassadors and of operating their military communities in such a way as to give the best possible impression of the United States to people in foreign areas. Incident to these basic responsibilities are the underlying responsibilities of providing for the security, health, welfare, schooling, religious activities, and physical safety of all of the members of the military community. To discharge these responsibilities the commander must have some control over the activities of his charges. He must be able to prevent and deter activities which would jeopardize the security and effectiveness of his command and he must be able to protect his personnel from one another.

B. EFFECTIVE CONTROL OVER CIVILIAN MEMBERS OF AN OVERSEAS MILITARY CONTINGENT CANNOT BE EXERCISED WITHOUT CRIMINAL JURISDICTION

In large part, commanders meet the heavy responsibilities outlined above by promulgation of orders, regulations, and other directives applicable to the personnel of their commands, and covering various phases of the daily activities of military and civilian personnel alike. Of course, if the commander has no jurisdiction over the civilians, he has no effective means of enforcing his directives in so far as they are concerned. In such a situation, a man or woman in civilian clothes could violate the commander's direc-

tives with impunity, whereas a man or woman in uniform could expect to be punished for a similar violation. For example, in connection with controlling narcotics, a commander promulgates a directive forbidding possession of hypodermic needles by nonmedical personnel. The directive could be effectively enforced against a serviceman's violation by court-martial, if appropriate, but if this serviceman's wife were not subject to military jurisdiction it could not now be enforced against her. Even more important are the security regulations which commanders promulgate. If there is no power to enforce such regulations as to the civilian contingent, the commander's orders become almost meaningless and the very security of the command may be impaired or undermined.

We have already set forth, at pages 3–12 of our reply brief, various examples of the types of matters over which a commander must assume responsibility, and we do not undertake to repeat those instances here. The fact is that all kinds of violations by the civilian part of our military contingent—whether the murder of a soldier as in these cases, or the introduction of narcotics, or black-marketeering, or neglect of safety regulations—necessarily affect the military portion of the contingent and the group as a whole and necessarily reflect on the status of our contingent as visitors in a foreign land. It would be unfair to permit a civilian to violate the commander's directives concerning security, black-market activities, illegal money conversions, postal operations, banking, ownership and operation of automobiles, entering off-limits

areas, etc., with impunity, while the soldier working at the next desk or living across the hall is tried by court-martial for participating with the civilian in the very same offense. Such a situation is contrary to one of the cardinal principles of maintaining discipline in a military community—or any other community—the fair, just, and equal treatment of all its members. Without doubt, the loss of military control over the civilian contingent would adversely affect the commander's ability to maintain a combat-ready force by destroying morale, undermining discipline, and disrupting the orderly processes of the command.

It is also, of course, a basic premise of our law that power to impose fines and imprisonment is the most effective means of deterring infractions of law. The fact that there have been comparatively few major offenses by civilians accompanying the forces overseas does not prove that court-martial jurisdiction is unnecessary. Army records show that during the last seven fiscal years the Army has tried by general court-martial 181 of these civilians and that 2,273 of them have been tried by either special or summary court-martial. In addition, other forms of action have been taken in cases of many such civilians as a result of activities not warranting trial by court-martial. In view of these figures, it is plain that some form of criminal jurisdiction must be exercised over them.

An idea of the importance of the exercise of punitive jurisdiction in relation to civilians overseas may

be gleaned from an analysis of the offenses tried. This break-down is currently available only for the Army and only for cases tried by general court-martial, not for the 2,273 lesser offenses which were tried by inferior courts-martial and which include violations of many of the types of regulations discussed above.[8] Nevertheless, the figures as to the more serious offenses show the various types of problems with which a command overseas is called upon to deal. The nature of the offenses points up the necessity for having available promptly, and on the spot, a tribunal capable of dealing with such violations. The figures are as follows:

ARMY TRIALS BY GENERAL COURT-MARTIAL OF OFFENSES BY CIVILIANS, 1950–1956[1]

Larceny	36
Failure to obey orders and regulations	35
Narcotics	29
Procurement (bribery, sale of government property)	19
Frauds against government	15
Murder	13
Sex offenses	10
Manslaughter	9
Robbery	6
Forgery	5
Other homicide	3
Assault	2
Other	62
Total	244

[1] These represent the number of offenses rather than the number of persons which was 181.

Administrative remedies are obviously not adequate to deal with offenses of this kind. They are also inadequate to deal with the many lesser offenses such as currency violations, disobedience to orders, and

[8] Data is available as to all trials of civilians in Iceland and is given in Appendix B, pp. 130–131, *infra*. Violations of regulations as to currency and liquor were the most frequent.

violations of base regulations. To deprive an employee of commissary privileges might either be ineffective as punishment, as in Paris where other supplies are available, or out of the question, as on a Greenland air base where no other food is available except that provided by the United States. Sending an employee back to the United States deprives the government of the services of a man who would not be there unless his services were required, and may in many cases be no deterrent at all. Sending a dependent back to the United States enforces that separation which the program of having dependents overseas is designed to avoid, and may also, in many instances, have no deterrent effect. In either case the "remedy" is costly and injurious to the accomplishment of the military mission.

It may properly be assumed, we suggest, that cases which can adequately be handled by administrative disposition are now being handled in that way, since this is easier than conducting a court-martial. The fact that in over 2,000 cases the commanding officer has found that a court-martial was required to consider and, if need be, punish civilians under his command demonstrates that those responsible for the success of our military missions overseas cannot maintain effective control without criminal jurisdiction.

C. ASSUMING THAT JUDICIAL ALTERNATIVES TO COURT-MARTIAL JURISDICTION WERE LEGALLY AND POLITICALLY AVAILABLE, THEY WOULD NOT PROVIDE THE PROMPT AND EFFECTIVE CONTROL REQUIRED

We discuss below in its legal aspects the Court's question as to the possible alternatives to trial by court-martial, and show that, with rare exceptions, as

to violations of military regulations there is probably no alternative at all, and as to general crimes, no real alternative except trial by the foreign state. Point II, *infra*, pp. 40–63. It is important here, on the question of practical necessity, to point out that no alternative that could be suggested would meet the problem of responsibility divorced from authority.

Even where foreign trial is a possibility, a commander must go to foreign authority to carry out the responsibility which the host country has indicated, and the United States has implicitly or by treaty agreed, should be his. If the suspect is an American civilian, and the victim is another American or our government, the foreign nation could not be expected to be as interested in prosecution as our own officials. In some cases, again consider a Greenland airbase, local officials may not be available regardless of their interest. If the foreign governments were to try our civilians, they would, of course, have to receive full cooperation with respect to any necessary investigations. Normally, some evidence relating to almost any offense is to be found within the military installation. This would mean that local police would have to be admitted to areas which are sensitive from a security standpoint. As a matter of fact, if jurisdiction over the civilians is wholly lost, it seems probable that policing of our installations would also pass to the foreign country. Thus, security precautions would have to be greatly increased, and it is unlikely that they could be made completely effective in such circumstances.

Many other problems would arise upon conviction and sentence by the foreign court. The commander could not supervise the conditions of imprisonment. There would be problems as to what action he could take with respect to prisoners in the event of an emergency, or even in the situation when the sponsor is transferred to another part of the world, leaving the wife, son, or daughter in a foreign jail. These and many other problems would flow from making our civilian contingent overseas subject to trial only in foreign courts. Such a result would adversely affect the morale and discipline of both the military and civilian contingent of our armed forces overseas. It would also seriously handicap the armed forces in securing the necessary civilians for overseas employment and in maintaining a professional corps of officers and men.

Moreover, trial in a foreign court would not solve the problem of violations of military regulations which are not offenses under the law of the foreign state. In particular, one class of offenses of greatest importance to overseas commanders and to this country would not be violations of the local law, namely security violations. Violations of commanders' directives would not be punishable under the foreign law, and many such directives necessarily relate to matters affecting security. Omitting consideration of major offenses, such as treason (see *infra*, pp. 61–63), infractions in themselves minor can seriously affect

security, and should be dealt with promptly. Also significant to some overseas commanders, particularly in the Far East, is the traffic in drugs, which must be strictly dealt with by command directives because they are not offenses under the law of the host state. See *United States* v. *Burney*, 6 USCMA 776, printed as an Appendix to our main brief in No. 713. In such cases, the United States commander's responsibility for his base requires the imposition of discipline under the United States law.

Trial in the United States, if it were legally and politically available (as to which see *infra*, pp. 40–63), is no adequate solution to the problem of responsibility. For many crimes, particularly those relating to military regulations, only prompt and local punishment would be effective. As a practical matter, civilians could still with impunity violate the directives by which the commander controls his command because all but the most flagrant cases would not be prosecuted by removal to this country. Prosecutions would often fail for lack of power to subpoena foreign witnesses. Necessity for return of American witnesses to the United States would undermine the efficiency of the armed forces overseas. In addition, persons accused would be at a disadvantage and delay would be inevitable. Discipline and morale would be disrupted by having one system of justice for the military and another for the civilian contingent. Such divided jurisdiction would, of course, make prosecution of joint offenses involving both military

and civilian personnel, unwieldy, ineffective and inefficient, and in many cases impossible.[9]

The real alternative to lack of court-martial jurisdiction over civilians would probably have to be to prohibit dependents and employees from accompanying the armed forces overseas.[10] Such action would have a direct, immediate, and palpable adverse effect on recruitment, morale, discipline, and efficiency of the forces. Congress has recognized the necessity for service families to accompany their service members overseas, and the presence of dependents there has proven to be a great morale factor. If dependents should in the future be precluded from accompanying their service sponsor overseas, the now difficult task of maintaining a peacetime professional corps of officers and men would be made even more so. Few men who are either married or expect some time to be married would choose the armed forces as a career if that choice meant frequent and long periods of separation from their families.[11] On the other

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[9] As discussed below, we do not regard trial by an American civilian court sitting in a foreign country as a possibility that can be achieved at this time. But even if it were possible, the issue of divided authority in a foreign area, where the commander is responsible for the whole unit, would remain.

[10] We have considered and rejected the thought that all adult dependents might be required as a condition of going overseas to enlist in some form of military auxiliary service which would be a part of the armed forces.

[11] A decision to allow no dependents overseas might lessen the willingness of some countries to have United States troops stationed within their territory. At the present time, the large dollar expenditures made locally by the American contingent is one factor weighing in its favor.

hand, as the matter now stands, the prospect of foreign travel as a family is sometimes a strong inducement to a service career. With respect to civilian employees, if the armed forces are precluded from employing skilled civilian technicians for overseas service, the only solution would appear to be widespread application of draft laws similar to the controversial "Doctors Draft Act" (50 U.S.C. App. 454 (i)). Otherwise, the armed forces could not function overseas, or in fact on the high seas since civilian technicians are an integral part of a larger ship's complement.

D. FOR PURPOSES OF COURT-MARTIAL JURISDICTION, THERE IS NO VALID DISTINCTION BETWEEN CIVILIANS EMPLOYED BY THE ARMED FORCES AND CIVILIAN DEPENDENTS

The previous discussion answers, we think, the third question asked by the Court, *i. e.*, "The relevance, for purposes of court-martial jurisdiction over civilians overseas in time of peace, of any distinctions between civilians employed by the armed forces and civilian dependents." For purposes of court-martial jurisdiction over civilians overseas in time of peace, no valid distinction can be drawn between civilians employed by the armed forces and civilian dependents. Indeed, except with respect to the strictly military offenses, no valid distinction can be drawn between soldiers, civilian employees, and dependents. The basic problem is one of control over a mixed community of civilian and military personnel who together represent the visiting American contingent, invited into the territory of a friendly foreign power

in response to the military needs of both countries. As we have pointed out, in the eyes of the host state, it is the whole contingent which is the visiting force. In the eyes of the United States, it is the whole contingent which is carrying out American policies. The responsibility is for the whole contingent. It makes no difference how the individual spends his days, nor is it important the kind of clothing he wears, be it a uniform or civilian suit.

One example may serve to illustrate this point. Take the case of a woman specialist serving overseas as a member of the Women's Army Corps. There can be no doubt that in this status she is subject to the Uniform Code of Military Justice. At the end of her voluntary term of service in the Army she elects to be discharged overseas and accept a job as a civilian employee. The chances are that the civilian job is the identical job she performed as a uniformed member of the military community. The only differences would be that she would not be required to wear a uniform while on duty, and if her status in the WAC had been that of an enlisted person she would probably move from her barracks to a civilian employees' billet. She would also be issued a passport identifying her as a civilian employee of the Department of the Army accompanying the Army overseas. None of these changes seems so drastic as to require that she be exempted from the entire code of laws which governed her conduct before she changed her clothing and received her passport.

To carry the illustration one step further, assume that our hypothetical young woman next marries a

uniformed member of the Army, but continues to work at her job as a civilian employee. At this point she occupies a dual status, and if civilian employees are subject to the Uniform Code of Military Justice, whereas dependents are not, her status becomes confused. It is not important to speculate as to which status would be controlling in these circumstances because, by the simple act of resigning her job, she could throw off any possible amenability to that Code. The final step is, of course, her resignation from the job to work full time at being a dependent. As such, she may not be able to have access to some materials and may not be in a position to violate some regulations which would apply only to workers. But she would still be living on the base, in constant contact with members of the armed forces, capable in many ways of affecting security, health, and welfare of the contingent. In each of these possible degrees of status, she is a true part of our visiting force overseas.

In short, in the realities of the modern world, civilian dependents and employees of a visiting force are an integral and necessary part of the force for which the commander is responsible, to his own and to the host country. His responsibilities demand the power to supervise and control possible offenders. Court-martial jurisdiction over the whole civilian component is thus a necessary concomitant of the responsibility which the commander unquestionably bears.

The decision whether civilians overseas are a necessary part of our armed forces and whether prac-

tical necessity requires that they be subject to military authority is primarily one for the executive and legislative branches of our government. Their judgment is and has been that civilian employees and dependents are a necessary, or, at the very least, a highly desirable addition to our defense forces overseas. The Congressional judgment is also that effective regulation of these civilians stationed in the territory of a foreign power requires court-martial jurisdiction over them. We respectfully suggest that this combined judgment of the executive and legislative branches of the government is not so without rational basis that this Court should overrule their considered determination.

II. NO ADEQUATE ALTERNATIVES TO THE EXERCISE OF JURISDICTION BY COURT-MARTIAL ARE AVAILABLE

Starting as we must with the basic premise, recognized by the prior opinion of the Court in these cases, that "each nation has jurisdiction of the offenses committed within its own territory" (351 U. S. at p. 479), we can give no definitive answer to the question as to the practical alternatives to the exercise of court-martial jurisdiction over civilians and dependents accompanying the armed forces overseas. The answer to that question is not for the United States alone; it will depend upon what concessions the various foreign countries where our forces and their civilian components are stationed [12] are willing to make. For most

[12] The country where forces are stationed is called in the NATO Status of Forces Agreement (Reply Br. p. 32) the receiving state, and is sometimes referred to that way in this brief.

offenses there are no alternatives except by the consent of the foreign government concerned. The statements we make must therefore be deemed merely prognostications in the field of international relations—a hazardous matter at best. On the basis of existing treaties, particularly the NATO Status of Forces Agreement, the pertinent provisions of which are discussed, *infra*, pp. 42–45, and the present attitudes of foreign governments, our guesses as to the alternatives that might be available are as follows: [13]

A. AS TO OFFENSES OVER WHICH THE FOREIGN STATE HAS CONCURRENT JURISDICTION, THE ONLY ALTERNATIVE TO COURT MARTIAL JURISDICTION OVER AMERICAN CIVILIANS OVERSEAS WHICH CAN REASONABLY BE ANTICIPATED IS TRIAL BY THE FOREIGN STATE UNDER ITS LAWS AND IN ITS COURTS

The practical alternatives to trial by court-martial of civilians overseas become more clearly focused when considered in terms of the present treaties than in terms of the interim arrangements, discussed in our original brief, under which jurisdiction of the defendants in these cases was obtained. The basic problem is of course the same, but the treaties, and in particular the NATO Status of Forces Agreement, [14] point up with clarity the basic fact on which all consideration of the validity of Article 2 (11) must rest—that this is a problem of international relations, and not a problem with which the

[13] Administrative sanctions by the military commander are discussed *supra*, *pp. 31–32*. They are obviously inadequate for more serious offenses, and experience has shown that they are not even appropriate or effective for many lesser offenses.

[14] The agreement was signed in London on July 19, 1951 (T. I. A. S. 2846) and was ratified by the United States Senate on July 15, 1953 (99 Cong. Rec. 8838).

United States can deal on its own. We discuss this matter primarily in terms of the NATO Status of Forces Agreement since it covers the countries where a large part of our armed forces overseas are situated.[15] Other countries where important contingents are situated, Japan,[16] and Germany[17] follow the same basic pattern and present the same alternatives. In all, there are agreements between the United States and over forty foreign countries which have some provision dealing with criminal jurisdiction.

Paragraph 1, Article VII, of the Treaty contains the basic grant of power and describes the persons subject to the treaty provisions, as follows:

> (a) the military authorities of the sending State have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State.
>
> (b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State.

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[15] The parties to the NATO Agreement are Belgium, Canada, Denmark, France, Greece, Italy, Luxembourg, the Netherlands, Norway, Portugal, Turkey, the United Kingdom, and the United States. Turkey and Greece did not sign the original document but acceded later. Iceland signed the agreement but did not ratify it. Iceland has entered into a bi-lateral accord with the United States. T. I. A. S. 2266, signed May 5, 1951; T. I. A. S. 2295, signed May 8, 1951.

[16] T. I. A. S. 2492, signed February 28, 1952.

[17] Convention with United States, England and France, T. I. A. S. 3425, Part Two, pp. 1496, *et seq.*, signed October 23, 1954.

Paragraph 2 of Article VII sets forth the circumstances under which the receiving or sending state will have exclusive jurisdiction to try offenses, to-wit:

> 2.—(a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.
>
> (b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State.
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> * * * * *

If an offense violates the laws of both the sending and receiving states, both states have jurisdiction.[18] The state that has the right to try the offender in the first instance is deemed to be the state having the "primary" jurisdiction and has the prior or superior right to try the offender. The rules for the determination of which state has the "primary" right to exercise jurisdiction, where the jurisdiction is concurrent, are prescribed in paragraph 3 of Article VII.[19] When there is concurrent jurisdiction, the

[18] Par. 3, Art. VII.

[19] No person is to be twice put in jeopardy within the same territory since paragraph 8 of this Article expressly provides in that respect:

"Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party

military authority of the sending state shall have primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to—

> (i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;
>
> (ii) offences arising out of any act or omission done in the performance of official duty.

In the case of any other offense, the receiving state shall have primary right to exercise jurisdiction.

Not in all cases, however, will the state having the primary right proceed to bring an offender to trial since paragraph 3 (c) of Article VII makes provision for a state having primary jurisdiction to receive a request from the other state for a waiver of its right to try the offender and—

> * * * The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

If the state having the primary right to exercise jurisdiction decides not to exercise its right, the state must

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and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of another Contracting Party."

notify the authorities of the other state as soon as is possible. When this is done, the state having the secondary right to exercise jurisdiction may prosecute.

Thus, the NATO Agreement is a specific recognition of the basic rule of international law that within its own territory a nation has the right to declare what acts shall be a crime under its law and punish violations committed within its territory by persons whatever their nationality. The receiving state, as a matter of international accommodation, has agreed in certain instances to give to the *military* authorities of the sending state the primary right to try nationals of the sending state, but the receiving state has not, even now, under the NATO treaty, given up its basic right to try foreign nationals for conduct which is a crime under the local law. If, therefore, the United States military authorities cannot, under our Constitution, exercise the jurisdiction thus conceded to them as the sending state, it remains the province of the receiving state, both under the principles of international law and the specific terms of the NATO treaty, to try the offender. Any arrangement for the exercise of United States jurisdiction other than by military authorities would have to be the subject of new negotiations between the United States and each country involved.

As stated at the outset of this Point, we cannot do more than hazard a guess as to what would be the outcome of any attempt to negotiate for the right to exercise a type of jurisdiction other than that now accorded to the United States military authorities. It can safely be said that no greater rights can be

assured. Further, there is no basis for anticipating that the United States would in fact succeed in obtaining the right to exercise any other form of judicial authority.

1. It seems unlikely, in the first place, that all the countries where dependents or employees are now living would agree that an offense which is a crime under their laws should be tried by the United States outside their territorial jurisdiction. The reason for this is their understandable desire to have assurance close at hand that justice has been done. Under Article VII of the NATO treaty the military authorities of the sending state are given the right to exercise criminal and disciplinary jurisdiction *within the receiving state*. See page 42, *supra*. As appears from the correspondence between the United States and the United Kingdom during the pre-NATO period (which was set forth in the Appendix to the government's original brief in No. 701, pp. 78–84), the consent by the United Kingdom to our exercise of jurisdiction even over members of our armed forces for trial in that country represented a "very considerable departure * * * from the traditional system and practice." The traditional British view is that members of visiting forces are completely subject to the jurisdiction of the local courts. See Barton, *Foreign Armed Forces: Immunity From Criminal Jurisdiction*, 27 British Year Book of International Law 186. As noted in the government's reply brief, p. 13, the United States, for itself, insisted in Section 2 of the Service Courts of Friendly Foreign Forces Act (22 U. S. C. 702) that trial by service courts of foreign countries take place

"within the United States." The same section provides that where the offense is against a member of the civilian population the trial shall not only be within the United States but "within a reasonable distance from the place where the offense is alleged to have been committed". The position heretofore taken by the United States and other countries provides no support for the conclusion that any government would relinquish jurisdiction to another state for trial abroad for conduct which is a crime under its own law and which was committed in its territory.

Even should one or more governments agree that the United States could remove military dependents such as Mrs. Covert or Mrs. Smith from its territory to the United States for trial for murder committed on its territory, the alternative of a civilian trial in the United States is not readily available. Unless it is a violation of the Uniform Code of Military Justice, murder committed in a foreign country is not now a crime punishable by the United States. As this Court said in *United States* v. *Bowman*, 260 U. S. 94, 98:

> Crime against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.

There would be substantial problems in adopting federal legislation which would cover the conduct which should be covered in order to maintain order and discipline on the military bases abroad, but which would not go too far. Should the Court hold that civilian dependents overseas must be accorded the same type of American judicial process as would be given to American tourists, it would not be clear that Congress could make a killing by one a crime against the United States without making a killing by the other also a crime. But to extend the extraterritorial effect of United States criminal statutes to apply to all United States citizens abroad would raise a number of problems. Any extraterritorial effect to United States criminal laws would create a substantial risk of trials within two countries for offenses arising from the same transaction where the constitutional protection against double jeopardy would not apply, as it would not where the second trial was in the foreign country. Moreover, other nations might not readily accept a sweeping assertion by the United States of a right to try all its nationals in this country for crimes committed abroad.

Even should such hurdles be overcome in drafting and adopting legislation defining categories of conduct abroad which are to be crimes against the United States (as well as crimes against the local government), there remain the questions of the extent to which trial in the United States for a local crime committed abroad would conflict with the venue provisions of the Sixth Amendment. Removal to the

United States might also, as a factual matter, deprive the defendant of his ability to obtain witnesses in his favor. The difficulties of a distant trial are obvious.

In short, for offenses such as the killings here involved, which are crimes under the law of the local foreign government, the alternative of a civilian trial in the United States is not now available, and cannot be assured. To make it available in the future would require concessions from all foreign governments where American troops are stationed beyond those which any government has heretofore made; it would also require legislation expanding the criminal statutes of the United States to cover the globe; and it would likewise appear to raise legal and practical problems at least as difficult as those involved in Article 2 (11) of the Uniform Code of Military Justice.

2. The alternative of a *civilian* trial by the United States *in the foreign country* seems no more promising. The United States would be reluctant to ask countries to agree, as one consequence of stationing United States troops within their territory, that they allow the United States to establish a system of civilian courts to sit in their country and to try American civilians who accompany the armed forces for conduct for which they could also be tried in the local courts. Any such request could not avoid the implication that a fair trial would not be available in the courts of the receiving state. There is a historical tradition in many countries that the country of a visiting military force is permitted to exercise jurisdic-

tion over its troops under its own law. See I Oppenheim, *International Law* (Lauterpacht), 8th ed. 1955, § 445. It is therefore not a radical departure from national traditions in many countries to cede to military authorities jurisdiction over civilian components of an armed force; rather, it is a recognition of the reality of the civilian component's being an integral part of the visiting force. To grant a civilian form of adjudicatory power would, on the other hand, be a serious break with tradition and, as we develop immediately below, a return to concepts of extraterritoriality which have been outmoded. It was a recognition of this fact which led the British to pass a statute equivalent to Article 2 (1f).[29] The pertinent section is reprinted in Appendix C, *infra*, pp. 132–133.

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[29] Section 209, Army Act, 1955, 3 and 4 Eliz. 2, Ch. 18. In explaining this legislation, the Report of the Select Committee (1953–1954 session) states (pp. xxvi–xxvii):

"• • • Between World Wars I and II the United Kingdom forces overseas were largely stationed in the Colonies but in most other places where troops were located His Majesty's Government possessed 'extra-territorial rights' which enabled His Majesty's Consuls to exercise civil and criminal jurisdiction over British subjects. When these rights were gradually relinquished a need arose to negotiate special jurisdictional rights for members of the forces. This occurred in the negotiations with Iraq and Egypt which culminated in the Anglo-Iraqi and Anglo-Egyptian Treaties of Alliance of 1932 and 1936 respectively.

"The necessity to settle the position regarding jurisdictional rights again arose in relation to certain allied countries during the war, but since the war and as a result of the continued stationing of United Kingdom forces in many foreign countries the problem has become a very general one and has been dealt with in several international agreements. The N. A. T. O. Status of Forces Agreement gives certain jurisdictional rights in respect of members of Her Majesty's forces and accompanying civilians stationed

In many countries, including Turkey and Japan where large contingents of United States forces are located, unilaterally established, separate foreign courts, such as the former consular courts, carried the stigma of "capitulations."[21] Japan succeeded in releasing itself in 1899 from the limitations imposed upon its sovereignty by the exemption of aliens from its local jurisdiction.[22] Upon the outbreak of war in 1914, Turkey announced the abrogation of the capitulations, which, it asserted, restricted its sovereignty. This unilateral action was contested by the United States, but by the Treaty of Lausanne of 1923 the contracting parties accepted their complete

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in any N. A. T. O. country, the Bonn Convention on the Rights and Obligations of Foreign Forces will govern the position in the Federal Republic of Germany, and a recent Treaty with Libya and a Protocol with Japan deal with the problem in those countries. The service authorities are, of course, under the existing legislation in a position to exercise these rights of jurisdiction in respect of members of the forces, but, except when the forces are on active service, they have no powers to exercise them in relation to civilians. The result is that, with few exceptions, civilians or followers who have to be brought to trial, must be brought to trial in the local courts and, if they are sentenced to imprisonment, must serve the sentence in a local prison.

"* * * The important object of the proposals is to give the military authorities the requisite statutory powers to exercise such jurisdiction over civilians and followers accompanying United Kingdom forces overseas as may be secured by Treaty or other arrangement with the authorities of the overseas territories where the troops are serving. * * *"

[21] On the general subject of extraterritorial jurisdiction, see Brown, *Foreigners in Turkey: Their Juridical Status* (1914), Chap. II; 2 Hackworth, *Digest of International Law* (1941), 493; 2 Hyde, *International Law* (2nd Rev. Ed., 1945), 849, where an elaborate bibliography may be found.

[22] Fenwick, *International Law*, 3rd ed., 273.

abolition[24] and the United States acceded to the abolition in a separate treaty signed in 1931.[25] Extra-territorial rights were terminated in Iran by unilateral action of the government in 1927.[26] More recently, in June 1956, the United States relinquished consular jurisdiction in Morocco by Joint Resolution of Congress.[27] The Soviet Union recently recognized the right of Poland to try Russian troops and dependents in Polish courts.[28]

At the time the Joint Resolution to relinquish consular jurisdiction in Morocco was under consideration by the Congress, the Secretary of State, in his recommendation to the Senate Committee on Foreign Affairs stated rather pointedly that the relinquishment of this jurisdiction appeared as "the only course in keeping with the high traditions of United States policy and with our sympathies for the aspirations of peoples moving along the road toward self-government."[29] The remarks made to the Senate on this matter by

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[24] *Foreign Relations of the United States*, v. II (1923), at p. 1153.

[25] *American Journal of International Law*, Vol. 28 (1934), Supp., 129.

[26] See 2 Hackworth, *Digest of International Law*, 532. For the abolition of capitulatory rights in Iraq, see 2 Hackworth, *Digest of International Law*, 517. The United States has a bi-lateral accord with Iraq (TIAS 3108, April 21, 1954).

[27] S. J. Res. 165; see Senate Report No. 2274, 84th Cong., 2d Sess., June 19, 1956.

[28] The Polish-U. S. S. R. agreement signed at Warsaw on December 17, 1956 follows closely the NATO Status of Forces Agreement. An authoritative translation is given in *The New York Times*, December 19, 1956.

[29] Senate Report No. 2274, 84th Cong., 2d sess., June 19, 1956, p. 2.

Senator George, as Chairman of the Foreign Relations Committee, characterized the situation in equally strong and unequivocal terms, as follows (102 Cong. Rec. (daily ed.) 10585):

> Mr. President, it is very important, too, that all of us recognize that the purposes of the joint resolution are fully in accord with America's traditions. A new Morocco has come into being. As it assumes the responsibilities of self-government, it is fitting that we assist it to attain a status of equality with other nations. By voluntarily renouncing the outmoded concept of extraterritoriality, we shall again demonstrate to the world our sympathy with the aspirations of those who have achieved self-government and the rights and responsibilities appurtenant thereto. The exercise of extraterritoriality to many is tinged with colonialistic connotations, which it is in our interest to erase.

Any possible solution to the problem of trying United States civilians by United States civil tribunals sitting in a foreign state would necessarily bear too great a resemblance to the older, resented, system. Even should the United States be constrained by circumstances to request other governments to agree to such extraterritorial jurisdiction, one cannot anticipate acceptance by the various countries involved.[29] And such requests might well

[29] We believe this to be true despite the fact that there has been one such arrangement. The agreements with Great Britain for the leased bases and the Bahamas Long Range Proving Ground uniformly provide that, if a state of war does not exist, the United States shall have exclusive jurisdiction over *security* offenses committed inside the Sites, where the accused is not a mem-

jeopardize the existing willingness of a foreign government to have United States military forces stationed within its country.

3. We think, therefore, that the conclusion is fully justified that, as to offenses which are crimes under the law of the receiving state, the only practical alternative to court-martial is trial by the country where the offense is committed. The original opinion of the Court is clearly correct in stating that, as to the crime of murder involved in the cases before the Court, "* * * the essential choice involved here is between an American and a foreign trial." (351 U. S. at 479.)

It should be noted that this choice extends to a very substantial portion of the crimes for which, under

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ber of the United States Forces, but is a person subject to the Uniform Code of Military Justice, if "a civil court of the United States is sitting" in the leased area. The agreements grant to the United States authority also to try British nationals, aliens and persons not subject to the Code under certain described circumstances, but the agreements provide that in cases of *security* offenses this "jurisdiction shall be exercisable only by a civil court of the United States sitting' in the particular area.

Art. IV, Modification of Leased Naval and Air Bases Agreement, T. I. A. S. 2105 (August 1, 1950); Art. V, each, Bahamas Long Range Proving Ground, T. I. A. S. 2426 (January 15, 1952), T. I. A. S. 3595 and 3603 (June 25, 1956). Parent agreement, Leased Naval and Air Bases, E. A. S. 235 (March 27, 1941).

The areas in which the agreements are to operate are fixed and definite, with the specific boundaries delineated in the agreements. The long term of years for which these agreements were executed, imparting to them a large measure of semipermanency, and the location of the areas involved, in some cases sparse and widely separated by long spans of water, make this a very special situation. It was agreed to originally in 1941 when Britain was at war. The right to set up United States civilian courts has never been exercised.

Article 2 (11), civilians accompanying the armed forces could be tried by court-martial. Not only are the major common law crimes such as murder, larceny, and the like in this category. Many offenses which are directed against the security of the United States also involve breach of security of the receiving state. And even offenses, which in the form in which they are tried by court-martial seem to involve only violations of military regulations, may in actuality involve problems of jurisdiction which would be raised if the American military authorities were rendered powerless to deal with the matter. For example, various black marketeering activities are tried under Article 2 (11) as violations of Article 92, *i. e.*, breach of regulations. Such transactions, however, frequently involve violations of local customs or taxing laws, as to which a waiver of jurisdiction could not be expected if the American authorities were unable to deal with the matter promptly at the seat of the crime. Article 2 (11), in a large part of its coverage, includes offenses triable under the law of the receiving state, and therefore represents a congressional decision to subject American citizens to trial by United States law rather than by foreign law.

We have already discussed, from the point of view of the practical necessities of command (*supra*, pp. 32–37), the difficulties that flow from dividing responsibility from power of supervision and control. It is also well to remember that, from the point of view of the Americans involved who look at the problem prospectively (as distinguished from a particular convicted defendant who hopes to gain immediate advan-

tage from a lack of jurisdiction), the right to be tried under United States law has advantages. It is not a reflection on the standards of other countries to recognize the validity of the Congressional judgment that members of United States military components should, so far as possible, be tried under United States military law rather than the law of a foreign state where our forces happen to be stationed because of United States military commitments.[30] To a certain extent, judicial procedures provided by some of the foreign governments would fail to accord to an accused rights which we in the United States have considered important in our judicial proceedings. In a number of countries a trial may be conducted without the presence of the defendant. The right against self-incrimination, the right to cross-examine, and other safeguards would not be available in the form known here to Americans who must stand trial in some of the countries where they are stationed. Unfamiliarity with the forms of procedure in itself results in hardship. And leaving out all other points of difference, it is well to remember that the mere fact

[30] As pointed out at pp. 17–18 of our reply brief, the sentiments of the United States public, as reflected in Congressional policy, seem to be that trial under United States law is the preferred alternative. As there pointed out, this sentiment was reflected in the advice and consent to the ratification of the NATO Status of Forces Agreement (4 U. S. Treaties, 1792, 1828) and in supplementary agreements with other countries. It has been the policy of this Government, in a large majority of the instances where the problem has arisen, to seek waivers from foreign governments of their primary right to exercise jurisdiction over our nationals in uniform or accompanying our armed forces as civilians.

that proceedings would in most countries be conducted in a foreign language in itself raises problems for any defendant.

The situation of civilian components of a military force is different from that of many other United States civilians in foreign countries, not only because they live more in a United States enclave than do the others and their presence is less casual, but because less volition is involved in their coming to the foreign country. A United States citizen who chooses to tour or to live in a foreign country has chosen to put himself under foreign law. A United States soldier is in a foreign country because the United States has sent him there, and his family is there because he has been sent there. And while perhaps more volition is involved in the case of civilian employees of the armed services, they too are there because of the needs of the United States. Hence, aside from the necessities of responsibility and discipline, discussed above, we suggest that, from point of view of a prospective defendant, he should be entitled to believe that, in being sent to a foreign country by the United States, he will still have the benefits of United States law as much as do the military he is accompanying.

B. AS TO OFFENSES WHICH ARE NOT CRIMES UNDER THE LAW OF THE FOREIGN STATE, BUT ARE CRIMES ONLY UNDER AMERICAN MILITARY LAW, THE ALTERNATIVE TO COURT-MARTIAL JURISDICTION IS NO TRIAL AT ALL

So far as the cases before the Court are concerned, which involve murder, a crime under the local law, the question of alternatives is disposed of by the considerations discussed above. Article 2 (11) does, however, cover other categories of crimes which we dis-

cuss more briefly in the interests of a complete presentation of the problem before the Court.

The NATO Agreement, and others in the same pattern, distinguish between concurrent jurisdiction where the act is an offense against both sovereignties and exclusive jurisdiction where the act is an offense under the laws of one sovereign. The military authorities of a sending state have been accorded exclusive jurisdiction to try members of their armed forces and civilian components for acts which are an offense only under laws of the sending state.

In the category of offenses which under these treaties are subject to the exclusive jurisdiction of United States military authorities are many violations of regulations governing a particular area, and punishable as violations of Article 92.[31] The nature of these regulations is discussed *supra*, pages 29–30, and at pages 7–12 of our reply brief. While, as noted above, many of such offenses may also involve violations of local law in different form, there are others which are offenses only against the United States, including, in the Far East, narcotics offenses. Also in this category are many of the offenses which in actual practice have been tried by inferior courts-martial. See e. g. Appendix B, *infra*, p. 130.

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[31] That article provides:

"Any person subject to this chapter who—

"(1) violates or fails to obey any lawful general order or regulation; or

"(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the same; or

"(3) is derelict in the performance of his duties; shall be punished as a court-martial may direct."

As to these offenses, the alternative to trial by court-martial is, as a practical matter, no trial at all. Certainly that is true at this time. By hypothesis, the offenses in this category are not offenses under the law of the receiving state and therefore are not triable in its courts. Most of them are not now offenses under the general criminal laws of the United States. They are legally, what they are practically, violations of military law because they contravene the rules governing the conduct of military affairs in a military area.

We may assume that Congress would have the power to make acts of American civilians accompanying the armed forces violative of military regulations relating to a particular overseas area an offense against the United States, punishable in the civilian courts of the United States. This theoretical power would be for the most part completely ineffective as a method of enforcement of the type of regulation here involved. Enforcement of health, welfare, and disciplinary measures relating to a particular area must be swift and local if it is to be effective. The difficulties of transporting witnesses and trying a case far from the scene of the crime make it evident that no attempt could be made to try any but the most flagrant violations. The delays necessarily incident to any such distant trial would seriously undermine the deterrent effect inherent in prompt action even if trial eventually were had. Moreover, even in flagrant cases, trial cannot be assured. This type of violation is not now generally subject to extradition since our treaties for the most part cover only major common-law types

of crimes recognized by both states. See 4 Hackworth, *Digest of International Law*, 41–45. A civilian not subject to military discipline, whose operations in violation of military regulations had been gross and profitable, might find an easy way of escaping punishment merely by refusing to return to the United States.

The only alternative to trial by court-martial for this type of military offense that could be effective to deal with the problem would be, not only to make the offense a civilian crime, but also to provide some on-the-spot tribunal for the trial of such civilian offense. Although an attempt to negotiate for some such civilian tribunals would not be an attempt to have United States courts sit in a foreign country for trial of an act which is a crime under the laws of that country, we nevertheless believe that, for the reasons discussed above as to offenses under foreign law (*supra*, pp. 49–53), consent to any such arrangement could not be anticipated. The stigma which attached to consular courts is too recent and the distinctions between that system and any proposal for a system of American civilian courts in foreign territory would be too fine to justify the expectation that any such proposal would find general or ready acceptance. Rising nationalism is not likely to accept the concept of foreign civil courts on local soil. Even the taking of depositions in ordinary United States civil litigation has sometimes presented problems.

Moreover, the difficulties from the United States' standpoint of an attempt to set up such a civil tribunal, which would accord the degree of due process

and appellate review now available in military tribunals, are fairly obvious. Even such a matter as assuring adequate counsel for a defendant would present problems which are now taken care of as a matter of course in military practice. And, if it should be deemed that, for the trial of an act made an offense against the United States, there would have to be the equivalent of a trial for a crime in the United States, the difficulties become even greater, both from the point of view of establishing a workable system and of securing foreign acceptance to such a system. We need not dwell on the problems of providing judges with life-time tenure, and of organizing a grand and petit jury system within the limitations of American personnel available overseas. A regular system of civilian courts to try civilians in foreign territory, even for crimes against United States law alone, is not, at present, a foreseeable alternative to trial by court-martial.

C. ONLY FOR EXTRATERRITORIAL OFFENSES AGAINST THE GOVERNMENT OF THE UNITED STATES IS TRIAL BY CIVILIAN COURTS IN THE UNITED STATES A POSSIBLE ALTERNATIVE TO COURT-MARTIAL, AND EVEN AS TO SUCH OFFENSES SERIOUS PRACTICAL PROBLEMS WOULD BE PRESENTED

There is one, special, limited group of offenses not involved in the cases now before the Court where civilian trial in the United States can be said to be possible. Our law has long recognized that there are offenses against the government of the United States which may be committed outside the territory of the United States. *United States* v. *Bowman*, 260 U. S.

94. Treason, espionage,[7] and fraud against the government fall in this class. Such offenses are, by definition, crimes against the United States and not crimes under the law of a foreign country, although some of the acts done may also be a crime against the law of the local state. The offense as such is, however, a violation of United States law alone and as such is triable in United States courts if jurisdiction over the offender can be obtained and the necessary proof adduced.

This category of offenses does, therefore, present special problems not now before the Court. We do wish to point out, however, that even as to this type of offense, where trial in a civilian court is now legally available independently of treaty arrangements with a foreign country, a civilian trial in the United States is not a wholly adequate solution. The problems of a distant trial—on which we have already touched (*supra*, pp. 35–36)—exist in this type of case, also. We do not refer to trials for treason. The gravity of this offense is such that we can well assume that, whatever difficulties may be involved in trial far from the scene of the offense (difficulties which would affect a defendant as well as the prosecution), the trial should be in our courts.

The extraterritorial offenses which have thus far

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[7] Even as to espionage there is doubt as to whether conduct within a foreign country is a crime against the United States under the present statute in view of its language making it apply "within the admiralty and maritime jurisdiction of the United States and on the high seas, as well as within the United States." 18 U. S. C. 791.

actually been tried under Article 2 (11) are cases of minor fraud against the United States and bribery of United States officers. In seriousness and character, these are usually comparable to violations of base regulations. The necessity, from the standpoint of command, of the power to deal with any such infractions promptly and on the spot is equally great. And it is well to repeat that, as the venue provisions of our Constitution recognize, a trial at the scene of the crime is considered a benefit to a defendant, rather than to the prosecution. Moreover, there are risks of evasion since, as already suggested, many extradition treaties do not cover this type of offense.

In any event, the problem of which court should try a defendant where his offense abroad is a violation both of the Uniform Code of Military Justice and of an existing United States criminal statute is not here now; and whatever the answer to that question may be it does not solve any problem as to these offenses. As to the offenses here involved, the United States has the right to exercise only such jurisdiction as the foreign country has been willing to agree to, and that concession has been made to United States military courts.

In short, as to the majority of offenses which may be committed by civilians overseas, the alternative to court-martial jurisdiction is trial under foreign law in foreign courts. As to crimes which are not offenses under the law of the receiving state, the alternative in all but rare instances is, in actuality, no trial at all.

III. ARTICLE I, SECTION 8, CLAUSE 14, OF THE CONSTITUTION IS PROPERLY READ IN CONJUNCTION WITH THE NECESSARY AND PROPER CLAUSE TO CONSTITUTE A BROAD GRANT SUSCEPTIBLE OF EXPANSION UNDER CHANGING CIRCUMSTANCES

The Court has invited discussion of the following material:

> 2. The historical evidence, so far as such evidence is available and relevant, bearing on the scope of court-martial jurisdiction authorized under Art. I, § 8, cl. 14, and the Necessary and Proper Clause, and bearing on the relations of Article III and the Fifth and Sixth Amendments in interpreting those clauses. In particular, the question whether such historical evidence points to the conclusion that the Art. I, § 8, cl. 14, power was thought to have a fixed and rigid content or rather that this power, as modified by the Necessary and Proper Clause, was considered a broad grant susceptible of expansion under changing circumstances.

We think that the historical materials discussed below show that the power to make rules for the government of the land and naval forces, conferred by Article I, section 8, clause 14, is, like other enumerated powers, to be read with the necessary and proper clause, and that it was not a power thought to have a fixed and rigid content but rather was explicitly considered to be a broad grant "without limitation" enabling Congress to use means that were then "impossible to foresee." The framers of the Constitution were aware that power to provide for defense had to be flexible to meet unforeseen emergencies. They did

not hobble a new nation in regard to its defense forces. They undertook to avoid the risk of military abuses not by limiting the power or scope of the army but by making the army subject to control by the elected representatives of the people.

A. THE HISTORICAL MATERIALS SHOW THAT PROTECTION FROM MILITARY EXCESSES WAS TO BE ACCOMPLISHED BY MAKING THE ARMY SUBJECT TO CONTROL BY THE NATIONAL LEGISLATURE, NOT BY CONFINING MILITARY AUTHORITY IN THE CONSTITUTION.

1. The Constitution was drafted and adopted against a background of military abuses by the British king. As early as 1628, people in England were complaining about the encroachment of the military on the civilian population and the use of military tribunals to try common law crimes and civilians. The Petition of Right, 3 Chas. 1, c. 1, presented to the Monarch in that year set forth as a grievance that authority had been given to try "Soldiers or Mariners, or other dissolute Persons joining with them" by court-martial "as is used in Armies in Time of War." [3] As a result of continued abuses by the monarch the Bill of Rights was passed in 1689.[4] This act among other things prohibited the raising and keeping of a standing army within the kingdom in time of peace without the consent of Parliament.

The Declaration of Independence reveals that complaints and fears of a military establishment were not confined to the homeland. That document regis-

[3] Fairman, *The Law of Martial Rule* (2d ed., 1943), p. 9.

[4] 1 Wm. & Mary Sess. 2, Ch. 2.

ters four separate complaints against the use of the military by the monarch:

> He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures.
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> He has affected to render the Military independent of and superior to the Civil power.
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> * * * * *
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> For quartering large bodies of armed troops among us:
>
> For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:

When the framers of the Constitution met at Philadelphia, this fear of military power was present in the minds of some delegates and was expressed several times throughout the proceedings. Proposals were made to protect the country from future military abuses by limiting the power of the military. At one point during the proceedings, for example, an amendment was proposed which would have limited the size of the standing army in time of peace to a specific number of men.[35] The resolution was defeated, however, after debate which urged that there was "no room for Mr. Gerry's distrust of the representatives of the people." 5 Elliot's Debates, 442, 443. That this fear of the military was considered at both the Federal Convention and the State conventions is further indicated by speeches made in the various State debates. Luther Martin, the Attorney General

[35] The figure suggested was two or three thousand. 5 Elliot's Debates, 443.

of Maryland, for example, speaking before the convention in that State dwelt at length on the fact that the fear of a standing army was expressed by the minority at the Federal Convention but was rejected by the majority. *Secret Proceedings and Debates of the Federal Convention*, pp. 59–62.

At another point during the constitutional convention it was proposed to include language critical of standing armies by making an addition to the clause granting Congress the power to provide for organizing, arming and disciplining the militia as follows:

> and that the liberties of the people may be better secured against the danger of standing armies in time of peace. [5 Elliot's Debates 544.]

The proposal was rejected by a vote of nine States to two. Far from imposing strict limitations on the power of Congress to raise and maintain armies and provide for their government and regulation, the majority of delegates refused even to incorporate language in the nature of a *caveat* into the Constitution. While it was provided that no State should without the consent of Congress keep troops or ships of war in time of peace, the power of the United States to do so was not limited.

Attempts were again made to include restrictions on federal military power during peace time at the time of the adoption of the Bill of Rights. Several States proposed amendments calculated to limit a standing army in time of peace.[38] None was ever

[38] Elliot's Debates, Vol. 2, p. 406; Vol. 3, p. 660; Vol. 4, p. 245.

adopted. The only explicit restriction on military power contained in the Bill of Rights is the Third Amendment relating to the quartering of soldiers in private houses.

As this recital shows, the basic decision made by the constitutional convention, repeatedly, was to obtain protection from the sort of military abuses suffered in the past at the hands of the British crown, not by tying the hands of the military, but by making the military subject to control by the popularly elected legislature. The power to raise and support armies was given not to the executive but to Congress. The power to make rules for the government and regulation of the land and naval forces was again not left in the hands of the executive but given to Congress.[37] To assure that the military at all times remained under the control of Congress the Constitution provided that no appropriation of money for the use of the army should be for a longer term than two years. The framers believed that by placing the power to raise and support armies in the legislative branch of the government and limiting military appropriations to two years they had succeeded in obviating the

[37] The clause granting Congress power to make rules for the government and regulation of the land and naval forces was included in the final draft of the Constitution without either discussion or debate. The only reference to the clause itself appearing in Madison's Journal is the following (5 Elliot's Debates 443):

"A clause, 'to make rules for the government and regulation of the land and naval forces' was added from the existing Articles of Confederation."

Neither the original draft presented to the convention nor the draft submitted by the "Committee of Detail" contained the clause. 5 Elliot's Debates 130, 379.

dangers found in the English system. This thought was perhaps best stated by Hamilton when he wrote:

> "* * * the whole power of raising armies was lodged in the *legislature*, not in the *executive*; * * * this legislature was to be a popular body, consisting of the representatives of the people periodically elected; * * *."

2. This discussion indicates the general framework of the constitutional scheme dealing with our problem. Proposed restrictions on the use of military authority in peacetime were rejected; broad and general powers to control the military were given to Congress. Against this background, we reach the precise question: What construction was placed on the Congressional power to make rules for the government of the land and naval forces? Was this power thought to have a fixed and rigid content or to be a grant susceptible of expansion under changing circumstances? The answer comes from *The Federalist* itself.

In *The Federalist*, Number 23, Hamilton discussed the military powers which would be given to the federal government by the Constitution then under consideration by the States.[39] In explaining the power

[39] *The Federalist*, No. 24.

[40] The authoritative nature of the construction placed on the Constitution by *The Federalist* is inherent in the circumstances in which it was written. Following the convention, Hamilton, Madison, and Jay wrote the essays collectively known as *The Federalist* as newspaper articles, answering criticisms against the proposed Constitution and urging its adoption. They may be compared with statements made on the floor by a sponsor or manager of a particular piece of legislation. This Court has frequently relied, it goes without saying, on *The Federalist* in interpreting the Constitution. *E. g., United States* v. *Pink*, 315 U. S. 203, 230; *District of Columbia* v. *Thompson Co.*, 346 U. S. 100, 109.

given Congress to make rules for the government of the army and the navy, Hamilton explained that this properly was left without limitation so that Congress could use a great variety of means to meet changing circumstances:

> The authorities essential to the care of the common defence, are these: to raise armies; to build and equip fleets; *to prescribe rules for the government of both;* to direct their operations; to provide for their support. *These powers ought to exist without limitation; because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite; and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defence.
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> * * * * *
>
> * * * Shall the union be constituted the guardian of the common safety? Are fleets and armies, and revenues, necessary for this purpose? The government of the union must be empowered to pass all laws, *and to make all regulations which have relation to them.* * * *
>
> * * * * *
>
> Every view we may take of the subject, as candid inquirers after truth, will serve to convince us, that it is both unwise and dangerous

> to deny the federal government an unconfined authority in respect to all those objects which are entrusted to its management. * * * A government, the constitution of which renders it unfit to be entrusted with all the powers which a free people ought to delegate to any government, would be an unsafe and improper depository of the national interests. Wherever these can with propriety be confided, the coincident powers may safely accompany them. [Emphasis added.]

This is surely a clear and authoritative statement that the power to make rules for the government of the armed forces was intended to give Congress the power to use means the "extent and variety" of which it was "impossible to foresee or to define". The power was considered to be coextensive with all the possible combinations of circumstances. Congress was to have the power "to make all regulations which have relation to" the fleets or the armies.

Hamilton was a distinguished army officer who undoubtedly knew that civilians under certain circumstances were subject to court-martial jurisdiction. His discussion of the powers given Congress to make rules for the government and regulation of the land and naval forces cannot be read to mean that that power was to be fixed and limited to meet only the circumstances that then existed. Rather, his language shows that the power to make rules for the government of the forces was understood to be capable of development to meet unforeseen exigencies. His definitive words accord fully with the general spirit in which the framers dealt with military power.

There is thus no historical or textual reason why the authority conferred by Article I, section 8, clause 14, like other enumerated powers, should not be read in conjunction with the necessary and proper clause. Our Constitution, drafted in the eighteenth century, has been found workable in the twentieth because the framers and the men who were subsequently called upon to interpret it recognized it as a flexible, rather than a rigid, document. There is no reason why the power to provide for defense needs should be less flexible than any other power, and in fact there are grounds why it should be more flexible. No doubt the framers did not envisage the time when the United States would have large military contingents stationed abroad with their families; nor did they envisage the complexities of modern war and defense which require the services of civilian experts as well as soldiers. But they knew that unforeseen situations in relation to defense could arise and they drafted a Constitution with that thought in mind.

Nothing in the history of Article III or the Fifth and Sixth Amendments detracts from this conclusion. The journals of the state and federal conventions fail to reveal anything tending to show a relationship between Article III and Article I, section 8, clause 14. In the federal convention the provision for a trial by jury in criminal cases was apparently accepted without question.[41] In the majority of the state conventions the debates centered on the failure of the Constitution to provide for trial by jury in civil

[41] 5 Elliot's Debates 381, 484, 550, 563.

cases." The exception, incorporated in the Fifth Amendment, for "cases arising in the land and naval forces" was apparently not a subject of controversy.

3. Thirty years after the Constitution was adopted, the scope of the necessary and proper clause was considered by the Court in *McCulloch* v. *Maryland*, 4 Wheat. 316. Whether Chief Justice Marshall's notable opinion for the unanimous Court is considered as historical evidence or as legal authority it presents a view of the Constitution, and of the power of Congress to adopt laws which it believes necessary to meet the responsibilities placed upon it, which is fully applicable to these cases:

> * * * A constitution, to contain an accurate detail of all of the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.
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> * * * * * *
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> But the constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be

[a] 2 Elliot's Debates 515; 4 Elliot's Debates 143, 151; *The Federalist*, No. 83.

> necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof." * * * [pp. 407, 411–412.]

In famous words, the proper interpretation and scope to be given the necessary and proper clause were stated (at pp. 421 and 423):

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

And that Chief Justice Marshall considered the necessary and proper clause to apply to all of the enumerated powers of Congress is clear from the following (at p. 423):

> * * * But where the law is not prohibited, and is really calculated to effect *any of the objects entrusted to the government*, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. [Emphasis added.]

It may be true, as stated in *Toth* v. *Quarles*, 350 U. S. 11, 23, that the scope of clause 14 is limited to "the least possible power adequate to the end proposed." But *Anderson* v. *Dunn*, 6 Wheat. 204, the source of this particular principle, which dealt with the contempt powers of Congress, reaffirms the cognate principle stated in *McCulloch* v. *Maryland* that the necessary and proper clause is applicable to all the powers enumerated in Article I, section 8 (p. 225):

> There is not in the whole of that admirable instrument [the Constitution], a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate.

These tests, stated so long ago, are still controlling in the cases which now confront the Court. The power to provide for the government of the "land and naval forces" is not a clause of fixed content, incapable of expansion beyond the jurisdiction known to the framers. It takes full sustenance from the necessary and proper clause, and has its roots, as Hamilton pointed out, in the framers' latitudinarian concept of Congress' military power and authority. That the power to make rules for the government of the "land and naval" forces was not rigidly limited to the exact jurisdiction known to the framers is apparent from the recognized power to make rules for the government of an air force. The extension of jurisdiction from settlers and camp followers in the field in the eighteenth century to military em-

ployees and dependents overseas in the twentieth is the same kind of application of a recognized constitutional power to new circumstances.

B. SINCE COURT-MARTIAL JURISDICTION OVER SOME CIVILIANS WAS RECOGNIZED AT THE TIME OF THE ADOPTION OF THE CONSTITUTION, ARTICLE 2 (11) IS MERELY THE ADAPTATION OF KNOWN CONCEPTS TO PRESENT-DAY CONDITIONS

Once it is recognized that the power to make rules for the land and naval forces is, like other enumerated powers, subject to the necessary and proper clause, it follows, for all the reasons discussed above, that Congress was acting within constitutional limitations when it provided for court-martial jurisdiction of civilians accompanying the army into the territory of a foreign power as part of our armed contingent overseas. Some civilians were already, at the time of the Constitution, subject to court-martial jurisdiction. The fact that civilians may be subject to military trial does not, therefore, represent a departure from concepts with which the framers were familiar. There has been merely an enlargement of the class of civilians subject to the power in line with the practical realities of the position of such civilians as part of a visiting military unit in the twentieth century. The extension of power is less great than the developing concept of interstate commerce in the light of twentieth century developments in communication.

We have already pointed out, at pp. 32–34 of our original brief in No. 701, that the concept of subjecting to military jurisdiction some civilians accompanying armies was not new at the time our Constitution

was adopted. The Articles of War of King James II of England, promulgated in 1688 governed victuallers and sellers of spirits. Winthrop, *Military Law and Precedents*, 2nd ed. (1920), p. 926. The British Articles of War of 1765 provided for jurisdiction over sutlers and retainers to the camp. Winthrop, *op. cit.*, p. 941.

The Articles of War adopted on June 30, 1775, provided that "All suttlers and retailers to a camp and all persons whatsoever, serving with the continental army in the field" were subject to the rules and regulations of the Continental Army. Winthrop, *op. cit.*, p. 956. This was repeated in 1776 with the change of designation from the "continental army" to the "armies of the United States." Winthrop, *op. cit.*, p. 967. Subsequent to the adoption of the Constitution, the language remained unchanged.

Further evidence that the framers would not be shocked by the thought of subjecting these civilians to military jurisdiction appears from the Articles of War relating to dealings with the enemy. Although the pertinent sections of the Articles of War enacted in 1775 which proscribed dealing with the enemy used the language "whosoever belonging to the continental army," the words "belonging to the continental army" were deleted in 1776, thus expanding the proscribed dealings to a larger class, including civilians. This same broad language was again repeated in the Articles of 1806.[43] While the basis for such Articles is more precisely the law of war or the right of a

[43] Winthrop, *Military Law & Precedents*, 2nd ed., 967, 981.

sovereign to protect its armed forces from spies, it is nevertheless significant that Congress enacted such Articles under its general power to govern the armed forces. The wording indicates that there was no hard and fast conviction on the part of the early legislators, many of whom were intimately associated with the federal constitutional convention or the state conventions, that the power set forth in Article I, section 8, clause 14 had a fixed or rigid content.

Further evidence that the drafters of the Constitution did not intend court-martial jurisdiction to be limited by the Constitution to those persons actually in the armed services is contained in the Fifth Amendment's language that the requirement of a grand jury should not apply to *cases* arising in the land or naval forces."[1] State constitutions adopted about the same time used similarly broad language. The identical phrase was used in the Pennsylvania Constitution of 1790 (Article IX, Sec. X) and in the Delaware Constitution of 1792 (Article I, section 8). The New Hampshire Constitution of 1783 provided for a jury trial for capital offenses "excepting for the government of the army and navy" (Sec. XVI). Nothing suggests that the legislatures, which were given the power to make laws for the government of the army and navy, were not given the power to decide what cases reasonably fell within that category. That under the general scheme which was adopted both by the States and by the United States the legislatures were

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[1] The same exception is read into the requirement of a jury trial in the Sixth Amendment. *Ex parte Quirin*, 317 U. S. 1, 40.

to have power to expand court-martial jurisdiction to the extent necessary for the government of the forces is made clear in the Massachusetts Constitution of 1780:

> XII. * * * And the Legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.
>
> * * * * * *
>
> XXVIII. No person can in any case be subjected to law-martial, or to any penalties or pains, by virtue of that law, except those employed in the army and navy, and except the militia in actual service, *but by authority of the legislature.* [Emphasis added.]

Here is stated expressly what we believe is implicit in the Federal Constitution: that consistent with the guarantee of a jury trial for cases not arising in the land or naval forces the legislature is given certain authority to determine what persons not actually in the army or navy were to be subject to court-martial because of their connection with the military. We submit that the Federal Constitution, which has no prohibition against the extension of court-martial jurisdiction, should not be construed as more restrictive than the Massachusetts Constitution which has such a prohibition.

Further, "Forces" historically is not synonymous with "armed forces" and never has been.[44] The early forces of England included the mariners of the mer-

[44] Cong. Globe, 37th Cong., 3d Sess. 955, *et seq.*

chant vessels in which the servicemen were transported."[46] The ancient Court of Chivalry heard the cases of nonmilitary persons connected with the armies."[47] Noncombatants accredited by military authority are treated when captured as a part of the land forces."[48] As early as 1895, this Court recognized that the constitutional phrase, "in the land or naval forces," did not necessarily restrict its application to the uniformed personnel of the armed forces. *Johnson* v. *Sayre*, 158 U. S. 109.

This historical evidence, taken together, indicates, as we have suggested, that the exercise of court-martial jurisdiction over civilians accompanying the armed forces overseas is not an undue departure from a pattern known to the framers of the Constitution. It is merely an adaptation of known concepts to changed circumstances. The expansion of power over civilians overseas occurred in 1916 (see our original brief in No. 701, pages 34–37) because in 1916 the United States emerged as a world power with world-wide commitments. The necessity for this type of jurisdiction is, as we have also pointed out, even greater now when the United States is under an obligation to keep large contingents stationed as a unit in the territory of friendly foreign powers. Just as it was a reasonable regulation of the armed forces in 1776 to provide for court-martial jurisdiction over cer-

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[46] 45 U. S. Naval Institute Proceedings 355, 367.

[47] 9 U. S. Naval Institute Proceedings 692, 694–696.

[48] Geneva Convention Relative to Treatment of Prisoners of War (1949), Art. 4A (4).

tain civilians dealing with the armed forces in the United States, it is reasonable now to provide for military control of Americans accompanying the armed forces abroad. To meet these new circumstances should not require a constitutional amendment. The Constitution is broad enough to enable the United States to assume, in relation to friendly foreign powers, the jurisdiction which those powers are willing to confer upon the United States military forces, the right to govern the whole contingent which is present in foreign territory because of the military needs of the international community."

Certainly to the extent that crimes committed by civilians accompanying the armed forces overseas, (including the crimes of murder in the cases before the Court) are not crimes to which the United States Constitution by its own terms would apply (*In re Ross*, 140 U. S. 453), but are local crimes under the law of the host state, there is nothing in the language or history of the Constitution which would prevent

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[49] As Judge Augustus Hand said in *Ex Parte Gerlach*, 247 Fed. 616 (S. D. N. Y.), in dealing with the constitutionality of Article of War 2 (R. S. Sec. 1342, as amended by the Act of Aug. 29, 1916, c. 448, 39 Stat. 651) which permitted trial of civilians accompanying or serving with the armies of the United States outside the territorial jurisdiction of the United States:

"Section 8 of article I of the Constitution is the source of authority for the Articles of War. Congress is thereby given power to raise and support armies, to make rules for the government of land and naval forces, and to make all laws which shall be necessary for carrying into execution the foregoing powers and all other powers vested by the Constitution in the government of the United States. The Articles were enacted in pursuance of the general war power, and ought to be given a broad scope in order to afford the fullest protection to the nation."

Congress from using the existing court-martial system to try civilians for such offenses. As the original majority opinion in this case pointed out, the choice as to such crimes is not between an Article III court and a military court, but between trial under United States law and trial under foreign law. The only question as to such crimes is whether it was reasonable for Congress to implement the right acquired by treaty to try United States civilians under United States law by using the existing court-martial system, rather than some other form of tribunal for that purpose. The historical evidence we have discussed shows that there is nothing to bar the reasonable Congressional decision that the court-martial—the only legislative tribunal available—may properly be utilized as the vehicle for trial of civilians accompanying the armed forces abroad.

IV. THE CONSTITUTIONAL DISTINCTION BETWEEN MAJOR CRIMES AND PETTY OFFENSES IS NOT A RELEVANT DISTINCTION FOR PURPOSES OF COURT-MARTIAL JURISDICTION OVER CIVILIANS IN FOREIGN TERRITORY

The fourth question posed by the Court is: "The relevance, for purposes of court-martial jurisdiction over civilian dependents overseas in time of peace, of any distinctions between major crimes and petty offenses." We show below that the distinction, which marks the line for which jury trial is or is not required under Article III and the Sixth Amendment, has no relevance to courts martial or to any trials outside the territorial limits of the United States because in neither case is Article III or the Sixth Amendment applicable to such trials. Only if the Court were now to overrule

prior decisions and hold that the Sixth Amendment applies to trials outside the United States could the distinction have any relevance. An attempt now to draw such a distinction with relation to trials of civilians accompanying the armed forces into foreign territory would be extremely difficult to implement and would leave unsolved many of the problems which Article 2 (11) was designed to reach and which are now being handled under existing international treaties.

A. THE CONSTITUTIONAL POSITION OF PETTY OFFENSES

1. Although the term petty offenses is not mentioned in the Constitution, it has long been recognized that, as a matter of construction, the guaranty of a jury trial in Article III and the Sixth Amendment does not extend to petty offenses of the type which, at common law, could be tried without a jury. *Callan* v. *Wilson*, 127 U. S. 540; *Schick* v. *United States*, 195 U. S. 65; *District of Columbia* v. *Colts*, 282 U. S. 63; *District of Columbia* v. *Clawans*, 300 U. S. 617; see also *Ex parte Quirin*, 317 U. S. 1, 39; and see Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. Law Rev. 917 (1926).

Exactly what a petty offense is for the purposes of this constitutional classification is not a simple matter. Although the decisions cited above all refer to the standard of cases tried without a jury at common law, this is not a test which can be automatically applied. There are now many regulatory-type offenses not known to the common law; moreover, the common law standard itself is not clear. As the

cited article in 39 Harvard Law Review develops in detail, by 1776 Parliament had gradually expanded the summary criminal jurisdiction of English magistrates so that at least a hundred different offenses were tried without a jury, some of which would probably now be considered as too serious to fall within the petty offense category. This Court apparently so recognized in *District of Columbia* v. *Clawans,* 300 U. S. 617. There, in upholding the right to treat as a petty offense the charge of engaging in the business of a dealer in second-hand property without a license, for which the maximum penalty was a fine of $300 or three months' imprisonment, the Court said (300 U. S. at pp. 627–628):

> But we may doubt whether summary trial with punishment of more than six months' imprisonment, prescribed by some pre-Revolutionary statutes, is admissible without concluding that a penalty of ninety days is too much.

Both the nature of the offenses and the maximum permissible punishment have been considered by the Court in determining whether an offense is a petty one. The punishment actually imposed is not determinative. In *Callan* v. *Wilson,* 127 U. S. 540, where a defendant was charged with conspiracy in the Police Court of the District of Columbia and fined $25, the Court held that his conviction without a jury was improper since the crime of conspiracy was not a trivial offense. And in *District of Columbia* v. *Colts,* 282 U. S. 63, 73, where the crime of reckless driving was subject to a fine of $100 and imprisonment of not

more than 30 days, the Court nevertheless held that a jury trial was required since the offense was not merely malum prohibitum but "in its very nature is *malum in se*." In general, the test for a petty offense seems to be that suggested by *District of Columbia* v. *Clawans*, 300 U. S. 617: Petty offenses are infringements of local police-type regulations, the moral quality of which is relatively inoffensive (300 U. S. at pp. 625, 630), and for which only a relatively minor penalty can be imposed (300 U. S. at pp. 627–628). See Frankfurter and Corcoran, *op. cit.*

18 U. S. C. 1 (3) now defines as a petty offense "any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or fine of not more than $500, or both." While this definition does not take into consideration the nature of the offense, which the decisions of this Court indicate must also be considered, it will probably prove adequate for constitutional purposes in the civil courts of the United States since the six-month maximum is usually fixed only for violations of regulatory, police-power statutes of the type that may properly, under the cases, be treated as petty offenses. The definition has not been called into question because it has been held that, even though petty offenses may be tried without a jury, Congress must specifically provide that there shall be no jury. *Smith* v. *United States*, 128 F. 2d 990 (C. A. 5).[10] Except in limited areas, discussed below, Congress has not so provided.

[10] In so ruling, the Fifth Circuit followed the analysis in the dissenting opinion of Mr. Justice Harlan in *Schick* v. *United States*, 195 U. S. 65, even though there was some language in the

2. While the exemption of petty offenses has, as a matter of construction, been read into the guaranty of jury trial in Article III and the Sixth Amendment, it is by no means clear that the same exemption can also be read into the provision of Article III for judges having life-time tenure.

The issue has not yet been presented for decision. Until 1940, Congress provided for non-jury trial of petty offenses before judges having less than life-time tenure only in the territories, the District of Columbia, and various national parks,[81] *i. e.* areas in which legislative courts, not deriving their power from Article III, could constitutionally act. See *Kendall* v. *United States,* 12 Pet. 524; *American Insurance Co.* v. *Canter,* 1 Pet. 511; *Ex Parte Bakelite Corp.* 279 U. S. 438, 449. Since 1940, the Petty Offense Act (54 Stat. 1058), now 18 U. S. C. 3401, provides for trial of petty offenses in the continental United States before commissioners (*i. e.,* persons not having life tenure) "in any place over which the Congress has exclusive power to legislate or over which the United States has concurrent jurisdiction * * *". See also as to national parks, 28 U. S. C. 632. But, even in these limited areas, Con-

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majority opinion pointing the other way. See 195 U. S. at pp. 70–71, where the Court said "There is no act of Congress requiring that the trial of all offenses shall be by jury, and a court is fully organized and competent for the transaction of business without the presence of a jury."

[81] The earlier national parks legislation, enumerated in the notes to Rule 54 (b) (4), F. R. Crim. P., was repealed by the revision of Title 28, and is now covered by 28 U. S. C. 632 making applicable 18 U. S. C. 3402 discussed in the text. The constitutional problems presented by this legislation were not the subject of judicial decision.

gress has provided for trial before commissioners only with the consent of the person involved, and only after the defendant has been apprised of his right to be tried before the district court. 18 U. S. C. 3401 (a) and (b). Since consent alone would not be sufficient to confer jurisdiction (see *McClaughry* v. *Deming*, 186 U. S. 49, 66), the theory of this statute, which has not been questioned, apparently is that in such localities Congress has power, under Article I, section 8, to provide, as in the District of Columbia and the territories, for courts which do not derive from Article III. When consideration was given by the 1943 and 1944 Judicial Conference to extending the pattern of 18 U. S. C. 3401 to petty offenses under the general laws of the United States, it was recognized that there was a serious constitutional question of the power to do so, although members of the Committee refrained from reaching any conclusion since the matter might be presented for judicial determination. Judicial Conference, *Report of the Committee of the Trial of Minor Offenses by Commissioners*, September 22, 1944.

It is, therefore, debatable (at the very least) whether, where an Article III court normally exercises the judicial power in an area, the infliction of punishment, even for petty offenses, does not so necessarily involve the exercise of judicial power that it must be done by a judge having life-time tenure. Clearly, infliction of substantial punishment is the exercise of judicial power. *Wong Wing* v. *United States*, 163 U. S. 228, 237. The same rationale may very well apply to the lesser punishment for petty offenses, so that a lifetime tenure judge would be

necessary even if a trial by jury is not. A petty offense is not a "crime" under either Article III or the Sixth Amendment. But whether the dereliction be a petty offense or a "crime", the accused might properly claim a right under the Constitution to a trial by a *court* and by a judge with life-tenure where the judicial power being exercised is constitutional and derived from Article III. Where legislative, nonconstitutional, judicial power is being exercised and Article III does not apply but the Sixth Amendment does—as in the District of Columbia and the continental territories (*Callan* v. *Wilson*, 127 U. S. 540, 550)—there must be a jury trial except for petty offenses by virtue of the Sixth Amendment. But where neither Article III nor the Fifth [32] or Sixth Amendments apply, the distinction between major crimes and petty offenses has no significance at all.

B. THE RELATION OF PETTY OFFENSES TO COURT-MARTIAL JURISDICTION

Since the distinction between petty crimes and major offenses has no significance where neither Article III nor the Fifth and Sixth Amendments apply, it follows, in our view, that the distinction has no relevance to court-martial jurisdiction of civilians accompanying our armed forces abroad. Neither Article III nor the Fifth and Sixth Amendments applies to offenses committed by such civilians abroad because (1) Congress, under its power to make rules for the government of the land and naval forces, can

[32] Where the Fifth Amendment applies, the test as to trial by indictment is, of course, the distinction between felony and misdemeanor, in which latter class petty offenses fall.

properly subject such offenses to trial by court-martial, as to which Article III and the Fifth and Sixth Amendment admittedly do not apply; and (2) Congress, in implementation of the power of the United States in international relations to obtain from the host state the right to try under United States law United States nationals for crimes committed abroad, may utilize in foreign countries legislative tribunals which are bound neither by Article III nor the Fifth and Sixth Amendments.

1. The first of these theories requires no discussion beyond that set forth in the other points in this brief, as well as in the arguments previously submitted. We have shown that the power to make rules for the government of the land and naval forces, conferred by Article I, section 8, clause 14, of the Constitution, is to be interpreted in the light of the necessary and proper clause. We have also shown that the practical necessity stemming from the responsibility which the military authorities have in relation to civilians accompanying the armed forces abroad to the civilians, the United States, and the host states, justifies their subjection to military law, much as sutlers and retainers to the camp were subjected to military law in the United States at the time the Constitution was adopted. It follows that trial by court-martial of civilians accompanying the armed forces into foreign territory are cases arising in the land and naval forces and therefore not under Article III and the Fifth and Sixth Amendments.

2. The question as to petty offenses posed by the Court is apparently directed to the second of the

grounds discussed above, and particularly to our position that the judgment of Congress in the choice of legislative tribunals for crimes committed abroad is uninhibited by the Fifth and Sixth Amendments. Since, as we have shown, the distinction between major crimes and petty offenses does not mark the boundary between Article III judicial power and non-Article III judicial power—and since Article III judicial power does not extend abroad—we assume that the question is directed to the issue of whether, where the United States does obtain the right to try its nationals for offenses committed abroad for which a legislative tribunal may be used, the Sixth Amendment nevertheless requires a trial by jury for any offense other than petty. In other words, the question is whether trial of civilians for offenses committed abroad would be analogous to trials in a territory or the District of Columbia, *i. e.*, trials for which non-Article III, legislative, courts may be used but to which the guarantees of the Fifth and Sixth Amendments apply.

So to hold would represent a drastic and in our view unwarranted departure from prior decisions of the Court. As we have pointed out, as to all acts which are offenses under the law of the foreign state, basic jurisdiction is in the foreign state; the United States has the right to try such cases only to the extent that the receiving state, through international negotiation, accords that right to the United States. That is the basic rationale which underlies the holding of *In re Ross*, 140 U. S. 453, that, where the United

States receives the right to try a United States citizen for a local crime committed abroad, the trial is not governed by Article III or the Fifth and Sixth Amendments. The United States Constitution, by its own terms, does not automatically apply to such crimes or to such proceedings (see the government's main brief in No. 701, pp. 61–65). That rationale is as valid, perhaps more valid, today than it was at the time of *Ross*. The United States is less free than it was then to decide unilaterally on the procedure to be followed. As we have also pointed out, *supra*, the concept of extraterritorial rights is generally an outmoded one in present day international relations. It is only because military commitments require the presence of a substantial contingent of visiting military force, which in modern times necessarily includes a civilian component, that rights to exercise jurisdiction in a foreign country are conceded. Such rights are conceded only to military authorities because military units have often been considered subject to their own law, and to assure prompt and effective control over the visiting force. Again as discussed above, there is no reason to believe that the cession by the receiving state would be made to other than military authority. If the United States cannot exercise the privilege so granted, the primary right to try the offender remains in the foreign state. We emphasize again that the true choice is not between a United States trial under the Fifth and Sixth Amendments, on the one hand, and a United States military court, on the other; the choice is trial by

United States court-martial under United States law or trial by foreign courts under foreign law.

Even as to crimes which are offenses under United States law alone, this Court has held that trials outside the limits of the continental United States are not subject to the specific requirements of jury trial and indictment specified in the Fifth and Sixth Amendment, but only to the requirement of due process which governs all actions by the United States. As to our insular possessions, it was recognized when we first acquired them that differing historical traditions made impractical and inapplicable the specific guarantees of those Amendments. *Hawaii* v. *Mankichi*, 190 U. S. 197; *Dorr* v. *United States*, 195 U. S. 138; *Ocampo* v. *United States*, 234 U. S. 91; *Balzac* v. *Porto Rico*, 258 U. S. 298. The reasons are different, but it is less feasible today than ever before to set up United States legislative courts in foreign countries to conduct trials by jury subject to the Fifth and Sixth Amendments. See *supra*, pages 49–54, 60–61.

3. Neither would it solve the problems arising from the presence of civilian components overseas to alter accepted law by making petty offenses triable on the spot by court-martial, but requiring all other offenses to be triable in the courts of the United States, which are, as a practical matter, the only courts that could conduct a trial governed by the Fifth and Sixth Amendments. In the first place, as we have stressed, it is questionable whether for offenses which are crimes under the laws of the host state, those countries would relinquish jurisdiction. Issues of responsi-

bility between the United States and the host country, now working smoothly, would become unduly complicated. As pointed out, *supra*, pages 54–55, there are many types of violations of military regulations, such as black-marketeering, which would also constitute violations of local laws. If military courts on the spot are limited to minor punishment, it could well be, that, for major transgressions, the local government and local public opinion would not permit removal to the United States for trial. See *supra*, pages 49–55, for the fuller discussion which we do not repeat.

Moreover, from the point of view of United States law alone, the distinction between petty offenses and major crimes in relation to court-martial jurisdiction would present many problems. The distinction cannot now be fitted into American military law. As pointed out above, the constitutional definition of a petty offense depends both on the nature of the offense and the maximum punishment. That concept is not embodied in the Uniform Code. The maximum punishment for any offense under the Uniform Code, except some few capital offenses like murder and rape, is set by the President pursuant to the authority conferred by Article 36. Not many offenses now bear a maximum penalty of six months or less, even though in practice this has proved to be the maximum punishment imposed in the majority of cases involving civilians. In fact, strictly speaking, the limitations set forth in the Manual for Courts-Martial (1951), par. 127 (c), are applicable only to enlisted personnel, and are to serve only as a guide in cases of officers,

cadets, or civilians. The significant distinction in military law, with relation to the extent of punishment, is made by the decision as to which type of court-martial should be utilized to try the offender, summary courts being restricted to a maximum sentence of 30 days confinement, and special courts to a maximum of 6 months confinement. Articles 19 and 20. But under the federal decisions discussed above (pp. 83–85), the extent of punishment actually imposed cannot be utilized as a test in determining whether an offense is "petty" for constitutional purposes. Any attempt to distinguish between petty offenses and major crimes for purposes of court-martial jurisdiction would therefore not be effective without Congressional action defining the offenses triable by court-martial as petty and fixing the maximum punishment for such offenses. In the meantime, our treaties with foreign countries relating to jurisdiction over civilians would for the most part be ineffective and negotiations could not be conducted on any firm basis until Congress had acted.

Beyond this, no limitation of court-martial jurisdiction to petty offenses would solve the practical problems discussed in Point I, *supra*, pp. 22–32. In essence, it would mean that minor infractions of regulations could be tried by court-martial, but that, for more serious offenses, only trial in a foreign court or a long-delayed trial in the United States would be available. There would almost be a premium to the offender in committing a serious rather than a petty violation. If reckless driving, for which there was a

maximum sentence of 30 days, is not a petty offense (*District of Columbia* v. *Colts*, 282 U. S. 63), many of the offenses which require the exercise of court-martial jurisdiction today would also not be petty offenses, and under such a theory would require trial by jury in the United States. Even the six month limitation on punishment, which may well represent the constitutional maximum, would be inadequate for many offenses which ought to be dealt with at the place, rather than in the United States. A major currency ring, for example, where foreign witnesses would most likely be necessary, might well find a six-month penalty a minor risk for large profits, and a trial in the United States too dubious to be a deterrent. In sum, it would be wholly unrealistic to hold that the military commander who is responsible for the whole contingent may punish minor infractions, but must rely either upon foreign authority or distant United States courts to punish major ones.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the briefs previously filed in these cases, it is respectfully submitted that the judgment in No. 701 should be reversed and that the judgment of the District Court in No. 713 should be affirmed.

J. LEE RANKIN,
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Assistant Attorney General.
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Major, USAF,
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JANUARY 1957.

APPENDIX A

Following the Court's ordering of a rehearing in these cases, the views of the various field commanders overseas were requested by the Department of Defense on the practical considerations referred to in the Court's order. We have reproduced in this Appendix the replies received from six of these officers. They are as follows:

Officer	Page
1. William R. Woodward Brigadier General, USA Commanding General Advance Section United States Army, Europe, Communications Zone. [The headquarters responsible for logistical support to U. S. forces in the forward area of France and Germany.]	98
2. Bruce C. Clarke Lieutenant General, USA Commanding General Seventh United States Army. [Headquarters for all United States Army combat units stationed in Western Germany.]	105
3. Charles D. Palmer Lieutenant General, USA Commanding General Headquarters United States Army Forces, Far East, and Eighth United States Army. [Operational headquarters for all United States Army units based in Japan, Okinawa, and Korea.]	110
4. R. F. Good Admiral, USN Commander, Naval Forces, Far East. [Japan, Korea, Okinawa, Ryukyus Islands.]	115
5. J. P. Walker Captain, USN Commander, U. S. Naval Activities, Spain.	120

OFFICE OF THE COMMANDING GENERAL

ADVANCE SECTION (7965)

USAREUR COMMUNICATIONS ZONE

29 Nov. 1956.

Subject: Court-Martial Jurisdiction Over Civilian Dependents.

To: The Adjutant General, Department of the Army, Washington 25, D. C. ATTN: JAGL.

1. The news that the United State Supreme Court has agreed to reconsider the question of the amenability to military law of dependents accompanying military personnel overseas is most disturbing. Reversal of prior Supreme Court rulings on this subject and the subsequent loss of disciplinary power over a substantial portion of the American personnel in the Advance Section, would place me in the invidious position of being responsible collectively for the activities, welfare, morale and safety of military and civilian personnel without jurisdiction over a major segment thereof.

2. Reasons for the continued need for jurisdiction over Department of the Army Civilians and dependents of military personnel in this command are set forth below:

a. I need court-martial jurisdiction over DA Civilians and dependents of military personnel to prevent black-market operations and to punish those who engage in such activities. Under present practices, a person who purchases Post Exchange goods and resells them to a French national, is subject to judicial punishment at the hands of a court-martial and to administrative fine at the hands of French customs authorities. These sanctions have proved necessary

because items such as radios, electric razors and refrigerators sell on the French market for more than twice the American price, with the result that there is a steady black-market demand for them. Dependents of military personnel and DA Civilians are subjected to pressure by their French maids and neighbors to obtain scare items for them. Cooperation between our military and the French civilian authorities have, up until now, kept this traffic to a minimum, while fear of court-martial has supplied a deterrent effect which fear of administrative fine lacks. Disruption of these arrangements would result in an immediate upsurge of black-marketeering, which would at once imperil our excellent relations with the French authorities and jeopardize the very existence of our Post Exchanges. Should the operation of Exchanges be curtailed or closed, the standard of living and the morale of our forces in the Advance Section would lower rapidly.

b. I need court-martial jurisdiction over the DA Civilians and dependents of military personnel to prevent reckless and drunken driving on the public roads in France and on US military installations. Military personnel and DA Civilians must continuously use the French public roads as well as the roads within US military installations. The manner in which they conduct themselves in doing so is a reflection upon the United States and the US military forces in France. Traffic control is a major problem due to the absence of speed limits on the open highways in France, to the narrow winding roads and to the unfamiliarity of our personnel with French traffic conditions and customs. The high accident rate has been a major obstacle in improving the community relationships with the French people. To protect our personnel from the unsafe driving of others and them-

selves, and to maintain friendly relations with the French, I must have disciplinary power since orientation lectures and safety programs will accomplish little without sanctions to support them. It is also necessary that the traffic within our military installations be regulated. If I cannot punish offenders, the alternative would be to invite the French authorities to police our installations. It is exceedingly doubtful if the French would undertake this task. It would be embarrassing to the US military and is precluded by security considerations. Not only should the rights of civilian motorists within our installations be protected but the rights of pedestrians and the children who attend schools within our military installations and who may be maimed or killed by reckless and drunken driving must be considered before placing our civilian motorists beyond US military jurisdiction.

c. I need court-martial jurisdiction over DA Civilians and dependents of US military personnel to enable me to control them in emergencies such as might occur in the evacuation of non-combatants from threatened areas. The evacuation of non-combatants from France and Germany prior to or at the outbreak of war is a major task. In such an operation, instant obedience to commands is required on the part of all of our civilian personnel. Fear of punishment at some remote time or place is not likely to induce our civilian personnel to obey orders under the conditions likely to be encountered in such an evacuation; neither the panic-stricken mob nor the solitary wife who will not abandon her husband is likely to be influenced by a tribunal far removed from the scene. The military must be able to enforce the orders that are issued or it cannot provide the safety of the civilian personnel it must protect.

d. I need court-martial jurisdiction over DA Civilians and dependents of US military personnel to pro-

tect the security of this command and to punish those who imperil such security. Department of the Army civilians often occupy positions of trust and confidence and consequently have access to classified information. Dependents of US military personnel who are not so employed have special opportunities to observe troop movements and dispositions which, if disclosed, would vitally effect the security of our military forces. I cannot maintain this security unless I can have jurisdiction over all personnel who have been exposed to classified information.

e. I need court-martial jurisdiction over DA Civilians and dependents of military personnel to ensure the continued satisfactory operation of the NATO Status of Forces Agreement in the Advance Section. The criminal jurisdiction aspects of this treaty would become unworkable should our disciplinary power over civilian dependents be withdrawn. Article VII, NATO SOFA, vests in us exclusive jurisdiction over offenses not cognizable under French law. It likewise vests in us primary jurisdiction over offenses directed solely against the property or security of the United States (including treason, sabotage and espionage), or against the property or person of its soldiers, civilian employees, or civilian dependents. Furthermore, we are required by our government to seek waiver of jurisdiction in all cases where French jurisdiction is primary. Should our disciplinary power over these civilians be withdrawn, the following consequences would ensue: (1) Crimes cognizable by US law, but not by French law, would go unpunished; (2) Crimes directed against the Army or its personnel would go unpunished unless the French could be persuaded to accept our waiver of jurisdiction and to prosecute with zeal; and, (3) Cases wherein the French have primary jurisdiction would, despite the contrary policy of our government, have to be in each case left

to the French to try. Two comments seem particularly relevant concerning this state of affairs. First, it is extremely difficult to insure the safety of our troops or the success of their arms, when the commander cannot punish those who engage in treason, sabotage or espionage, and when it is doubtful whether anyone else can or will. It is humiliating as well as dangerous to have to call in the French to protect us against treason, sabotage and espionage. Secondly, it is to be noted that where one civilian dependent injures another, such offense would likewise go unpunished; and while it may arguably be just to keep the former from trial by court-martial, it is indisputably unjust to deprive the latter of judicial protection against injury. It is argued that Article 2 (11), Uniform Code of Military Justice, should be held unconstitutional in order to protect civilian dependents; but civilian victims are at least as worthy of protection.

3. It is evident from the above discussion that no relevant distinction can be drawn between major and minor offenses; I need jurisdiction over both. The enforcement of traffic regulations within military installations concerns primarily minor offenses, while protection against treason involved major ones; yet in both cases I must accomplish the enforcement or these regulations will not be enforced.

4. It is equally evident that morale is affected as much as discipline, because discipline directly affects morale. Morale is lowered when offenses go unpunished. In the extreme case, where our troops are exposed to sabotage and are not authorized to protect themselves, it would be seriously understating the case to say that morale would be lowered.

5. The question arises whether there is any possible alternative to military jurisdiction. These appear

limited to two: waiving our jurisdiction to the French; or vesting jurisdiction in an American civilian tribunal. The first alternative seem thoroughly undesirable. The governmental policy of seeking waivers of French primary jurisdiction, deriving from the Senate reservation to NATO SOFA, is an expression of precisely this view. The French have little interest in trying cases not subject to their primary jurisdiction, and there is much difficulty for them in doing so. Where one American has injured another, the witnesses, the background, and the relevant social customs are equally foreign to the French court. Imprisonment of the guilty party costs French money. Investigation of the case costs French money. It is doubtful whether the French would be interested in going to the trouble or expense of prosecution and conviction, unless French nationals or property were involved. From the point of view of the United States, this state of affairs would be equally unsatisfactory.

6. Vesting jurisdiction in an American civilian tribunal would be more desirable, but less practical, than waiving jurisdiction to the French. Such a tribunal would have to be located within France, because transportation of the evidence and the American witnesses to the United States in each case would be too expensive, and because transportation of foreign witnesses to the United States would be impossible. Therefore the tribunal would have to be created in France, with all the attendant expenses of creating judicial machinery, assembling a civilian Bar, etc. Whether it would be worth the trouble and expense is not for me to say. It is to be noted, however, that no existing law or treaty contemplates such a tribunal. NATO SOFA explicitly refers to United States military authorities, and vests in these military authorities

jurisdiction which the proposed civilian tribunal would have to exercise. Likewise I have no reason to believe that France would allow such a tribunal to operate on its soil; if anything, the attitude of French officials and public within the ADSEC area would seem to suggest the reverse. In any event, a civilian tribunal (if it resembled civilian tribunals in the United States) would not bring cases to trial within the time-limitations dictated by our situation. Whereas civilian tribunals frequently take many months before hearing a case, we often have situations (as in the evacuations of dependents) which must be handled immediately. It follows that creation of such a tribunal is no answer to the problem of jurisdiction over civilian dependents.

7. In any event, the administration of justice by a non-military tribunal in cases involving civilian dependents would result in disparity of sentences and a consequent weakening of morale. Where the soldier who hits a civilian receives a different measure of punishment from the civilian who hits a soldier, bitterness and enmity are bound to result. This is particularly true in an overseas community, where the US military and civilians are banded more closely together.

8. The discharge of our mission, as well as the welfare of our men, would be seriously and adversely affected by loss of jurisdiction over civilian personnel.

William R. Woodward,
WILLIAM R. WOODWARD,
Brigadier General, USA,
Commanding.

Copy Furnished:
CINCUSAREUR
CG USAREUR COMZ

HEADQUARTERS

SEVENTH UNITED STATES ARMY

OFFICE OF THE COMMANDING GENERAL

APO 46, NEW YORK, *23 November 1956.*

Subject: Reargument in cases involving Constitutionality of Article 2 (11) UCMJ.

To: The Judge Advocate General, Department of the Army, Washington 25, D.C., ATTN: JAGL.

1. Reference is made to DA Message #473169 requesting the views of overseas commanders with respect to the necessity for retaining court-martial jurisdiction over civilian dependents of military personnel and civilians employed by the Armed Forces overseas.

2. There are approximately 60,000 civilian dependents of Seventh Army military personnel living in Germany today who are an integral part of the Seventh Army military community. This community numbers nearly a quarter of a million Americans spread over a large part of West Germany living in hundreds of different communities. Their transportation to this theater was provided by the military, and in a large percentage of cases they had concurrent travel with their military sponsors. In Germany the military provides them with complete logistical support including housing with furnishings, utilities, maintainance and repair; medical and dental care; commissary and post exchange privileges; religious, educational and recreational facilities; police and fire protection. In every essential of their daily lives, their activities are interwoven with those of the military. The successful performance of the primary mission of the Seventh United States Army, combat readi-

ness, clearly requires that civilian dependents be integrated into the overall military planning. Their close proximity in Germany to the Iron Curtain requires that they be under close military supervision to insure their protection and prompt evacuation in event of the outbreak of hostilities. Since the German government has accepted the Army's position that civilian dependents are a part of the military community, they occupy a privileged status in the German Federal Republic. Under existing treaties they are essentially exempt from the jurisdiction of German courts. Because of their exempt status as a part of the military community the German government expects military commanders to insure their proper conduct and observance of law. In view of the special status of civilian dependents and the supervisory obligation which a military commander assumes in their behalf, it appears only reasonable that civilian dependents should be generally subject to the same legal standards as military personnel. I believe, therefore, that it would be wholly unrealistic to deprive the military commander of the authority to exercise disciplinary control over civilian dependents overseas.

3. Disciplinary actions against civilian dependents have assumed no great proportions in Germany. In fact, court-martial cases involving civilian dependents are comparatively rare. This situation is a tribute to the law-abiding character of the overwhelming majority of our civilian dependents. If the disciplinary incident rate of Seventh Army civilian dependents as a group is compared with that of a city of similar size in the United States I believe the result would be very much in favor of the military dependents. Nevertheless, in any group of this size a few major offenses, as well as a larger number of minor offenses, will in-

evitably arise. Our relations with the German government are embarrassed from time to time by the commission of comparatively minor offenses such as black-marketing transactions with German nationals, unlawful currency transactions, infringement of German customs laws and violations of German traffic laws. Such offenses, moreover, have a direct and powerful impact on the efficiency and discipline of the command. If the military lacks the authority to punish civilian dependents for such offenses, the result would be to increase the incidence of these offenses on the part of the military. A few civilians engaging in unlawful practices in the military community can impair the discipline and hence the combat readiness of a unit. While it is infrequent that a dependent is actually brought to trial for a minor offense the mere threat of such action is a forceful deterrent. In its absence I think the problem would assume greater dimensions. The result would no doubt jeopardize our position as guests of the German nation and prejudice our assigned military mission in Europe. The authority to exercise court-martial jurisdiction over civilian dependents appears to me the only method of dealing effectively, fairly and justly with civilian dependent offenders overseas.

4. I see no practical alternative to court-martial jurisdiction. It has been proposed to make offenders overseas subject to trial in a Federal Court in the United States. Obviously this could only apply to felonies and major offenses. The result would be the loss of authority by any jurisdiction to deal with minor offenses. Insofar as major offenses are concerned, they would be tried thousands of miles away from the place of commission. Extensive delays would be inevitable. If the law cannot be enforced

expeditiously, it loses its deterrent effect. Both the United States government and the accused would face serious problems with respect to the production of witnesses in court. Attendance of German witnesses or other foreign witnesses could be only on a voluntary basis and the testimony of a foreign witness could not be compelled if the witness or his government refused to cooperate. The expense of transporting witnesses would be very great for the government and probably prohibitive for an accused. The consent of the German government would presumably be required before a case could be transferred to the United States for trial and it seems improbable that such consent would be forthcoming in the majority of cases. This would be certainly true in those cases in which the offense affected German nationals or German interests. The proposed alternative of trying overseas civilian offenders in a Federal Court in the United States for either major or minor offenses is therefore deemed impractical.

5. Another possible alternative is for Congress to establish a separate civilian court for the trial of civilians abroad. The possibility of securing from the German government the right to set up such a court in Germany appears remote. Such a proposal would undoubtedly be viewed as an infringement of German sovereignty reflecting adversely upon their judicial system and not justified by the same considerations which have allowed United States military courts to function within the German Republic.

6. The loss of court-martial jurisdiction over civilian dependents would undoubtedly result in their being made amenable to the jurisdiction of German courts. It is my understanding of the present Convention governing relations with the German Republic that the exempt status of civilian dependents rests on

their inclusion in the "Armed Forces" over which the Army exercises primary court-martial jurisdiction. The many objections which have been raised to the assumption of jurisdiction by foreign courts over United States military personnel would be repeated and intensified in the case of civilian dependents.

7. I assume that if jurisdiction were lost over civilian dependents a similar condition would prevail with respect to civilian employees of the Armed Forces. This latter category of civilians has long been considered subject to military court-martial jurisdiction. It appears to me that removing their amenability to court-martial jurisdiction would deal a severe blow to military discipline and efficiency. A very large number of these people, particularly in the supply, maintenance and logistical support fields, are performing substantially the same functions as their military associates. Failure on their part to discharge their responsibilities would seriously impede the mission of the military. Civilian employees, furthermore, have access to classified information, divulgence of which would be highly prejudicial to the national interests. The security of our forces, in such close proximity as we are in Germany to the Iron Curtain, requires that civilian employees should answer in the military courts for any violations. To subject the military personnel to one set of laws and their civilian counterparts to another would produce highly undesirable results. Offenses committed jointly by military personnel and civilian employees, instances of which have occurred in Germany, would have to be tried by different tribunals, one sitting in Germany, the other in the United States. The considerations noted above with respect to trial of civilian dependents in the United States are also applicable in the case of civilian employees.

8. In summary, instances where the exercise o court-martial jurisdiction is required over civilia dependents or civilians employed by the Armed Force are rare. When the exercise of such jurisdiction i necessary, however, I feel that it must be prompt an expeditious. If such jurisdiction is not availabl to the military, the result would be a time lag in th trial of such offenses in other forums, numerous com plications from trials in foreign courts, great expens involved if such trials are held in the United State and other collateral effects which in my opinion woul adversely affect morale, discipline, security, relation with the host country and the accomplishment o assigned military missions. Based on my years o experience in overseas areas, both in Europe and th Pacific, I unreservedly recommend that every effor be made to maintain court-martial jurisdiction ove civilian dependents and civilians employed by th Armed Forces in overseas areas.

Bruce C. Clarke,
BRUCE C. CLARKE,
Lieutenant General, USA;
Commanding.

Info copy to: USAREUR JA.

HEADQUARTERS
UNITED STATES ARMY FORCES, FAR EAST AND
EIGHTH UNITED STATES ARMY
(REAR)
OFFICE OF THE COMMANDING GENERAL, APO 343
SAN FRANCISCO, CALIFORNIA

AFFE-JA 250.4 AG 12 DEC. 1956.
Subject: Constitutionality or Article 2 (11), UCMJ
To: The Adjutant General, Department of the Army Washington 25, D. C., ATTN: The Judge Advocate General.

1. Reference Department of the Army message 473169, 15 November 1956.

2. The Commanding General, Army Forces Far East and Eighth United States Army is responsible for the supervision of military justice within the Army element of the Far East Command, including the members and civilian employees of the Army and their dependents in Japan, Korea, and Okinawa. Within this area seven commanders exercise general court-martial jurisdiction. Korea is the only country to which dependents are not authorized to accompany their sponsors at the present time.

3. There are no existing satisfactory and practical alternatives to the exercise of court-martial jurisdiction over civilian dependents in Japan.

a. Article XVII of the Administrative Agreement under Article III of the Security Treaty between the United States and Japan, effective 29 October 1953, recognizes the concurrent jurisdiction of Japan and the United States over members of our forces (including dependents and civilian employees) for criminal acts committed in Japan. Each country has exclusive jurisdiction over offenses violative of its own law, including security offenses, but not of the other's law. The United States has the primary right to exercise jurisdiction over military personnel and civilian employees for offenses arising from the performance of official duties or solely against the property of the United States, or against the person or property of other members of the U. S. Forces. Japan has primary jurisdiction over all other offenses, including the primary right to exercise jurisdiction over civilian dependents in all cases which involve a violation of the laws of Japan.

b. Japan can, within the framework of the Administrative Agreement, refuse to waive jurisdiction over

dependents who commit offenses in violation of Japanese law. However, because adequate disciplinary measures under U. S. military law are available and have been applied, Japan has elected to exercise criminal jurisdiction in only one case involving a dependent of Army personnel during the past three years. Experience has demonstrated that Japanese criminal trials are extremely slow and protracted. Penal institutions for women and juveniles do not meet the standards of U. S. institutions. Parole and probation procedures are difficult if not impractical to apply to the dependents of military and civilian personnel who make up a large portion of the U. S. Armed Forces communities in Japan. Japanese courts and law enforcement personnel are not as fully apprised of the regulatory needs and disciplinary and morale problems within the U. S. military community as is the local commander. Most offenses of a military nature, e.g., violations of regulations, are usually not punishable offenses under foreign law. Accordingly, if dependents were not subject to U. S. military law, such conduct would go unpunished.

c. For the reason that civilian employees and dependents are now subject to U. S. military law, the United States-Japan Administrative Agreement and its implementing agreements recognized the right and responsibility of the U. S. military forces to police their own installations, including military housing areas, and to police their own personnel, both inside and outside military installations, where only U. S. personnel and property are involved. Japanese police and judicial authorities have waived their right to enter and exercise their normal powers within U. S. installations.

4. The practical alternatives to trial by U. S. court-martial of dependents on Okinawa are unsatisfactory

at best. As Okinawa is under the jurisdiction of a U. S. military governor, a military government court could be established for the trial of civilian employees and dependents. Such a court, however, would still be operated by the military. Return of an individual to the United States for trial is not considered practical as it would generally entail transportation of military as well as indigenous witnesses.

5. If, as seems probable, dependents are admitted to Korea at some future date, the alternative to the exercise of court-martial jurisdiction over such dependents would present problems similar to those enumerated for Japan and Okinawa. The judicial and penal systems and confinement facilities of Korea, which are somewhat backward by U. S. standards, would raise additional problems concerning the protection of those rights guaranteed by the U. S. Constitution.

6. For purposes of court-martial jurisdiction overseas in time of peace, no distinction should or can be made between a civilian dependent and a civilian employed by the Army. In either case the individual is a member of a U. S. military community.

7. Any distinction between major crimes and petty offenses is important to the officer exercising court-martial jurisdiction only insofar as it is necessary to determine what disciplinary action, if any, should be taken. No jurisdictional separation of the two can logically be made. An offender who repeatedly commits minor offenses often presents a more serious disciplinary, morale, and rehabilitative problem than one who commits an isolated serious offense. The unauthorized purchase and sale of merchandise from post exchanges, commissaries, and similar activities and the unauthorized acquisition and disposition of Military Payment Certificates and local currencies, by

civilians as well as military personnel, although relatively minor offenses, have presented a continuing problem to this command because of the concern of the Government of Japan with the effect of these offenses upon the local economy.

8. Jurisdiction by courts-martial over all civilians accompanying the Army overseas is essential because of the manner in which U. S. Armed Forces personnel live in their overseas military communities. In this command, almost all personnel serving in or accompanying the U. S. Armed Forces live in or near separate, closely-knit U. S. military communities which are basically under the control, administration and supervision of the local U. S. Commander who is in turn responsive to the normal military chain of command. This responsibility which is vested in the military commander extends to the administration and supervision of the operation and use of all facilities and major activities of the community including the proper control of occupants and users which is inherent in such supervision overseas. In the absence of a supporting judicial system responsive to the same government as the military, such as is the case existing in the United States and overseas possessions, and as the law enforcement requirement stems primarily from the immediate unalterable responsibilities of the overseas commander and his subordinate commanders, it is essential that the commander be vested with the law enforcement authority commensurate with his responsibilities.

Charles D. Palmer,
CHARLES D. PALMER,
Lieutenant General, U. S. Army,
Commanding.

COMMANDER NAVAL FORCES, FAR EAST
F. P. O. SAN FRANCISCO, CALIF.

In reply refer to CNFE: N12: mr

29 Nov. 1956

Airmail
From: Commander Naval Forces, Far East.
To: Judge Advocate General.
Subj: Court-martial jurisdiction over civilians.
Ref: (a) JAG msg 152054Z of Nov 56.

1. Reference (a) requests views on various aspects of certain problems involving court-martial jurisdiction over civilians. In accordance with reference (a) the following is submitted.

2. "The specific practical necessities in the government and regulation of the land and naval forces which justify court-martial jurisdiction over civilian dependents overseas."

Court-martial jurisdiction over civilian dependents in the Far East is a practical necessity because:

(a) Except in Japan, no criminal jurisdiction could or would otherwise be exercised by anyone.

(b) Even considering Japan, the Japanese Government under the US-Japan Administrative Agreement does not have broad enough jurisdiction to handle all criminal offenses involving American civilian dependents.

(c) The control over conduct of civilian dependents, which is absolutely essential if they are to live on naval installations, cannot be maintained unless the ultimate threat of the exercise of court-martial jurisdiction is available. To reduce this to a simple example, it can be stated as a practical fact that enforcement of on-base traffic regulations by our own military police can be effective only because the military policeman is ultimately backed by the existence of court-martial jurisdiction over the offender. In the

United States, enforcement of regulations of this type is based simply on the commanding officer's powers to bar admission of persons to the base. At overseas installations such a barring from the base is not feasible because the dependents reside on the bases and derive all of their logistic support from the bases. This is but a single minor example of a multitude of regulations which are absolutely necessary to an orderly and effective administration of an overseas naval installation.

Beyond the minor regulations necessary to orderly administration of an overseas installation, which is a community in itself, there is the entire field of criminal law and suppression and punishment of crimes as recognized in any well-organized and civilized society that must be administered if people are to live together in any degree of harmony. As will be later asserted, it is our feeling that there is no practical alternative overseas to court-martial jurisdiction, and, thus, that jurisdiction is indispensable to the suppression of and recognized punishment for crimes as known at home.

3. "The practical alternatives to the exercise of jurisdiction by court-martial."

As *possible* alternatives to the exercise of court-martial jurisdiction, the following are submitted:

(a) Elimination of dependent travel to the Far East Command.

(b) Negotiation with the Japanese and other foreign governments with a view toward prevailing upon them to assume complete criminal jurisdiction over civilian dependents.

(c) Conferring jurisdiction on U. S. District Courts in the United States.

(d) Establishing separate United States Courts in the Far East Command areas with criminal jurisdiction over civilian dependents and operating under a

Congressionally enacted penal code and procedural rules offering required constitutional safeguards.

Alternative (a) of barring travel of dependents to the Far East is considered impractical in peacetime because of the extremely adverse effect on morale and attendant weakening of a Navy struggling for its very existence in the highly competitive search for competent and qualified personnel. The alternative appears even less practical when it is considered that such an approach would also call for discontinuance of use of civilian employees overseas. American civilians are widely used in overseas naval installations and our entire Military Sea Transportation Service is dependent almost exclusively on the utilization of American civilian merchant seamen.

Alternative (b) of negotiating a turnover to foreign governments of complete jurisdiction is impractical for many reasons.

Our experience in Japan indicates that the Japanese for political reasons are much more interested in the right to exercise criminal jurisdiction than in its actual exercise. In only a small percentage of cases do they now exercise jurisdiction when they have the primary right. There is serious doubt that they could be prevailed upon to accept jurisdiction of cases where only American personnel and American property were involved. Furthermore, the American political climate appears violently opposed to any further relinquishment of jurisdiction over Americans to foreign tribunals. Such a move would simply separate more Americans from constitutional protections. Although current jurisdictional arrangements with the Japanese have not seriously affected morale, a complete abandonment of jurisdiction over dependents, as a matter of principle, might well jeopardize Navy morale.

It is also manifestly impractical to expect the foreign governments to incorporate into their criminal

law the vast number of minor regulations which are indispensable to the orderly and efficient administration of overseas naval installations.

Alternative (c) of conferring jurisdiction on courts in the United States is obviously impractical. Evidence and administrative obstacles, even in the most serious of crimes, would be insurmountable. The speed so essential to effective administration of criminal justice could not be provided. And it would be impossible to reduce the multitude of regulations which will vary from area to area and command to command to a workable penal code.

Alternative (d) of establishing United States Courts overseas is also impractical. It would involve the creation of a complete police and judicial system for each area. And there would remain the obstacle of legislating a penal code which would adequately cover the varying regulation needs of different areas and commands.

4. "The relevance, for purposes of court-martial jurisdiction over civilians overseas in time of peace, of any distinctions between civilians employed by the armed forces and civilian dependents."

No relevant distinctions, for purposes of court-martial jurisdiction, between civilian employees and civilian dependents are readily apparent. Both, at present, accompany the armed forces overseas with full knowledge of their amenability to trial by court-martial. Both accompany the armed forces overseas as free and voluntary acts of their own choosing. Their implied consent to court-martial jurisdiction is certainly as clear as that given when a person voluntarily enters the territory of any State of the United States. And both upon arrival overseas join the communities established at naval installations.

5. "The relevance, for purpose of court-martial jurisdiction over civilian dependents overseas in time

of peace, of any distinctions between major crimes and petty offenses."

Although there are obvious distinctions between major crimes and petty offenses, such distinctions do not influence our needs in this area. On the surface society has lost less when a traffic violator goes unpunished than when a murderer goes free. But the fact remains that orderly and efficient administration of overseas naval installations demands that criminal trial jurisdiction ultimately exist at the disposal of responsible government authorities to effect order and protect the peace and well-being of the sizeable communities that exist at these installations. The responsible government authorities in this instance happen to be exclusively military commanders, but they must still have the authority necessary to discharge their responsibilities to their country and to the world. If their authority to regulate conduct on the installations placed under their sole charge is not backed up in the end by the prospect of trial and punishment of persons allowed on those installations, those responsibilities imposed upon them cannot be properly discharged.

6. It should be borne in mind that the comments submitted herein do not purport to be a discussion of U. S. constitutional law, but simply reflect the practical views of this command. That the effectiveness of our command would be utterly destroyed if control of *military* personnel were lost, is self-evident. And in the final analysis it is the law and court-martial criminal jurisdiction which permit effective exercise of control over military personnel. A factor of loyalty of persons under this command—loyalty to country and its accompanying loyalty to the Navy and the officers thereof—is not overlooked; nevertheless, the cold practicalities force concession that loyalty

alone without the power to exercise criminal jurisdiction would not get the job done. In the end the power to punish provides the power to effectively control. The civilian component of this command and the dependents possess their share of loyalty to country, but at the same time they are active members of large and complicated social communities existing at every naval installation in the Far East Command. Although we have had only very few occasions where we have seen fit to invoke court-martial jurisdiction over a civilian, and those occasions only as virtual last resort, the cold practical fact remains that it is the background power to exercise criminal jurisdiction by court-martial which permits us to maintain our naval overseas communities as orderly social units. Were court-martial jurisdiction as now granted by the Uniform Code of Military Justice declared to be unconstitutional, the impact on our military mission would be severe. The chaos and uncertainty that would undoubtedly follow would seriously jeopardize our mission and might well destroy the effectiveness of this command.

R. F. Good,
R. F. Good.

UNITED STATES NAVAL ACTIVITIES, SPAIN
APO 285, C/O POSTMASTER, NEW YORK, NEW YORK

FF5-3/EF66: GSS: pbr
P17
Ser: 574

29 Nov. 1956.

From: Commander U. S. Naval Activities, Spain.
To: Judge Advocate General.
Subj: Court-Martial jurisdiction over civilian dependents and employees overseas.

Ref: (a) JAG msg 152054Z of Nov. 1956.
Encl: (1) Navy population figures for Spain; (2) Copy of Procedural Agreement No. 16 to the 26 September 1953 Agreements between the United States and Spain [not printed].

1. The Judge Advocate General, by reference (a), has requested the views of this command: (a) as to various aspects of problems related to court-martial jurisdiction over civilian dependents and employees overseas, hereinafter set forth; and (b) as to the impact on its military mission if jurisdiction to try dependents and other civilians under Article 2 (11), UCMJ, should be held unconstitutional by the United States Supreme Court. Article 2 (11) covers under the Code, subject to treaty agreements and international law, "all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States" and certain territories.

2. Procedural Agreement No. 16, executed by and between the United States and Spain on 4 February 1955 (reference (b)), similarly defines the term "Members of the United States Forces" as having "reference to military personnel of the United States Armed Forces, the technicians and personnel accompanying, serving with or employed by said forces who are subject to the military laws of the United States and members of the families of the aforementioned individuals". Current population figures for personnel of the foregoing categories who are under United States Naval jurisdiction in Spain are set forth in enclosure (1). In addition, the Procedural Agreement will apply as well to the increase in personnel contemplated for activation of the U. S. Naval Activities at Rota, Cartagena, and El Ferrol. To avoid classification of this letter, the population esti-

mates for these activities are not set forth herein, but may be obtained from the Chief of Naval Operations.

3. The Procedural Agreement also applies, of course, to personnel under the jurisdiction of the Army and Air Force, and is considered to be quite favorable to the United States. It contains the following salient provisions:

a. Primary and exclusive jurisdiction is granted to the United States for the trial or other disposition of all offenses, whether against United States or Spanish law, committed by "members of the United States Forces", *provided* such offenses are "punishable under the Uniform Code of Military Justice". The offender is thereafter immune from Spanish prosecution.

b. Spanish authorities may prosecute a "member of the United States Forces" in Spanish courts only if the Chief, Joint United States Military Group accedes to a request therefor and executes a waiver of jurisdiction. Such waiver might be appropriate in the case of an offense committed by a member of the United States Forces jointly with a Spanish National who would not be subject to trial by United States authority.

c. Custody of a member of the United States Forces, who may be prosecuted by Spanish authorities, because of waiver of United States jurisdiction or because the offense charged is not punishable under the Uniform Code of Military Justice, shall remain with the United States authorities until such time as the trial is concluded and the sentence pronounced, and the United States authorities shall accept the responsibility of assuring the presence of the offender at the time of trial.

d. A member of the United States Forces who may be prosecuted by Spanish authorities shall be entitled

to the same rights and privileges as those enjoyed by Spanish citizens and (1) to be protected against Ex Post Facto laws, Bills of Attainder, and the use of a confession obtained by illegal or improper means; (2) to be informed, in advance of trial, of the specific charges against him; (3) to have a prompt, speedy and public trial before an impartial court, with a representative of the United States Forces present; (4) to be present at his trial, be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor; (5) to have counsel of his own choice or free legal counsel furnished on conditions applicable to Spanish citizens; and (6) to have the services of a competent interpreter.

4. In the paragraphs following are set forth the views of this command upon the specific points raised by reference (a).

5. *The specific practical necessities in the government and regulation of the land and naval forces which justify court-martial jurisdiction over civilian dependents overseas.*

a. *Language Barrier.*—It must be recognized at the outset, and borne in mind during consideration of the entire problem, that the great majority of the "members of the United States Forces", both military and civilian, speak little or no Spanish. They cannot, therefore, deal with Spanish officials as they would with local officials back home.

b. *Spanish Government Expectations.*—Because of the large number of "members of the United States Forces" present and contemplated to be present in Spain, and especially in view of the language barrier, it is natural for the Spanish Government to expect the United States to keep its own house in order.

The Procedural Agreement discussed above so provides and contemplates that offenses not punishable by the United States will be punished by the Spanish government.

c. *Internal Administration.*—The United States Forces provide considerable support for their personnel, military and civilian, and their dependents, the administration of which is a matter of internal management and must be accomplished by United States rules and regulations. Included in such support are Post Exchange and Commissary facilities, medical and dental care, issuance of coupons entitling the purchaser to exemption from Spanish gasoline taxes, reimbursement of rental expenditures by government employees, obtaining of Spanish auto and driver's licenses and identification cards, clearance of personal and household effects through Spanish customs, etc. Violations must be punishable if such rules and regulations are to be effective and the support continued.

6. *The "practical" alternatives to the exercise of jurisdiction by court-martial.*—Various alternatives exist, none of which are considered practical, for the reasons set forth below:

a. *Exercise of jurisdiction by Spanish Courts.*—The Procedural Agreement described above clearly contemplates that the Spanish authorities may and will prosecute in the Spanish courts offenses which are not punishable under the Uniform Code of Military Justice. Denial of United States court-martial jurisdiction over dependents and other civilians would automatically confer jurisdiction upon the Spanish Courts as to all such persons. This would be highly objectionable from the American point of view because of the following considerations:

(1) ***Disadvantage to the Accused.***—Differing procedures of the Spanish Courts, complicated by the

language barrier noted above, would make it difficult for the average American to assist in his own defense, even though he be provided with an interpreter. The rights to be present at his own trial, to be confronted with the prosecution witnesses, and to be represented by counsel, lose much of their value when the accused, himself, can follow neither the proceedings nor the testimony, and cannot converse with his own lawyer. Differing concepts as to the seriousness of a particular offense may also operate to the disadvantage of the accused. In addition, Spanish standards for places of confinement and concepts of punishment are different from our own.

(2) *Administrative Difficulties.*—Exercise of jurisdiction by Spanish Courts in the cases of all dependents and other civilians would impose a considerable administrative burden upon United States authorities who would, under the Procedural Agreement, be required to assume custody and insure the presence for trial of each offender pending the outcome in the Spanish Courts and would also be required to keep a representative on call for each case as it came to trial. Despite the guaranty in the Agreement of a speedy trial, common experience indicates that considerable delay may be anticipated in such cases. During periods of delay, it might well become necessary to withhold transfer of military personnel pending release of their dependents by the Spanish Courts. Also, in the case of civilian employees, it might easily become necessary to extend periods of employment, pending outcome of trial of themselves or their dependents, as an alternative to casting them off in an alien land. Of paramount concern, however, would be the necessity to report to and request prosecution by the Spanish Authorities of offenses relating peculiarly to the internal administration of the

military forces, i. e., abuse of Army Post office, Post Exchange and Commissary privileges, frauds or embezzlement of United States funds. Moreover, some of these offenses would not constitute violations of Spanish law and so could not be prosecuted.

(3) *Burden on Spanish Government and loss of prestige of the United States.*—As noted above, the Spanish Government expects the United States Forces to police themselves and would undertake the police responsibility only with reluctance. Requesting them to do so on the ground that United States military courts lacked jurisdiction would result in considerable loss of prestige on our part. This is particularly true in a country, such as Spain, where their courts-martial have exclusive jurisdiction over members of the military forces, even as to offenses against the civil law, and also have jurisdiction over civilians who commit offenses against the military establishment. Upon activation of the Spanish bases, the lack of United States court-martial jurisdiction could be expected to result in trial by Spanish court-martial of United States dependents and other civilians.

b. *Exercise of jurisdiction by United States Civil Courts.*—No such jurisdiction now exists and could be exercised only after appropriate enabling legislation and agreement with the Spanish Government. The exercise of jurisdiction by United States Civil Courts as to offenses committed in Spain would be manifestly impractical. Such courts could not readily sit in the United States since all the witnesses, real evidence, and complaining parties would be located in Spain. If such courts were to sit in Spain, such considerations as the selection and empanelling of juries and the employment of civilian counsel would pose very serious problems. Furthermore, the operation

of military and civil courts, side by side, would cause a lack of uniformity in the administration of discipline and justice among personnel of the United States Forces in Spain. Since the extent of jurisdiction to be exercised by the civil courts would rest upon agreement with the host country, further lack of uniformity would appear from country to country where our forces are present. The exercise of jurisdiction by our military courts has been accepted by the Spanish Government as a natural concomitant to the presence in Spain of our military forces. It is not to be expected, however, that the Spanish Government would willingly accept the establishment of the United States Civil Courts within its borders nor the transfer of all offenders to the United States for trial.

c. *Exercise of only administrative jurisdiction.* This would amount, in most cases, only to the withholding of privileges or the transfer from Spain of an offending dependent and or the discharge of an offending employee. Such action would not be sufficient, in many cases, and, in others, would not satisfy the Spanish authorities.

7. *The relevance, for purposes of court-martial jurisdiction over civilians overseas in time of peace, of any distinctions between civilians employed by the Armed Forces and civilian dependents.*—No distinction is made in the Uniform Code of Military Justice and none is made in the Procedural Agreement.

8. *The relevance, for purposes of court-martial jurisdiction over civilian dependents overseas in time of peace, of any distinctions between major crimes and petty offenses.*—No distinction is made in the Uniform Code of Military Justice and none is made in the Procedural Agreement.

9. *Impact on military mission if jurisdiction to try dependents and other civilians under Article 2 (11) should be held unconstitutional by court.*—The military mission of the United States Forces in Spain would be very seriously impeded by the loss of court-martial jurisdiction over dependents and other civilians, for the reasons stated above. In summary, it is apparent that such jurisdiction is absolutely essential to the government and regulation of our forces in order to preserve the favorable Procedural Agreement with the Spanish Government and because of (a) the Language Barrier, (b) the expectations of the Spanish Government that we will police ourselves, and (c) the numerous matters which require internal administration, regulation and enforcement and which are of no concern to the host government. It is equally apparent that there are no *practical* alternatives to the exercise of such jurisdiction. Denial of court-martial jurisdiction would immediately throw an unwanted and unwarranted burden on the host government and would probably require the negotiation of new agreements. It would also result in the loss of considerable prestige now enjoyed by our Government and its citizens in Spain, and would greatly impair the recruiting of civilian personnel for employment in Spain. The great majority of our civilian personnel would be most reluctant to give up the guaranties and protections now enjoyed by them before United States courts-martial in return for exposure to trial by a strange court in an alien land with strange proceedings in an alien tongue.

10. It will be noted from enclosure (1) that the major portion of the United States personnel under naval cognizance in Spain are under the jurisdiction of the Officer-in-Charge of Construction, Bureau of Yards and Docks Contracts, Spain. The prepara-

tion of this letter has, accordingly, been coordinated with that activity and the comments herein contained reflect the past experience of that activity in such matters.

J. P. Walker,
JJ. P. WALKER.

Copy to: (less encl. (2)):
ASSTCHJUSMGNAV
CINCNELM
OICC, BUDOCKS CONTRACTS, SPAIN

[Enclosure]

POPULATION AS OF CITIZENS UNITED STATES FORCES NAVY IN SPAIN

Activity	Navy members	Navy dependents	Civil service members and dependents	Prime contractor employees and dependents	Subcontractor employees and dependents
COMNAVACTS SPAIN	55	90	5		
OICC, BUDOCKS CONTRACTS, SPAIN	57	83	286	1,706	302
Other	26	38	26		
Totals	118	211	317	1,706	302

APPENDIX B

An indication of the type of offenses involved in the summary and special court-martial cases of civilians may be gained from the experience in Iceland, for which we have data available. The only civilians who have thus far been tried by court-martial in that area have been male employees. The charges and disposition have been as follows:

Summary court martial

Dec. 4, 1952—employee—attempted customs violation—fined $25.

Dec. 29, 1952—employee—attempt to sell liquor to enlisted men—fined $25.

Dec. 29, 1952—contractor employee—selling whiskey to enlisted men—fined $25.

March 13, 1953—post exchange employee—attempt to take whiskey off-base—fined $50.

March 31, 1953—employee—disorderly in Hotel De-Gink—fined $100.

July 22, 1953—employee—possessed $700 in U. S. currency—fined $300.

July 22, 1953—employee—signed false certificate to convert military payment certificates to U. S. currency—fined $300.

July 22, 1953—employee—possessed $100 in U. S. currency—fined $300.

July 23, 1953—contractor employee—possessed $200 in U. S. currency—fined $300.

Aug. 17, 1953—employee—possessed $100 in U. S. currency—fined $300.

Feb. 4, 1954—employee—fail to remain on base; violate Reykjavik curfew—confined at hard labor 20 days.

Jan. 25, 1955—contractor employee—wrongfully appropriate tire and wheel belonging to the United States—fined $25.

April 5, 1955—contractor employee—drunk and disorderly—fined $25.

Oct. 31, 1955—employee—selling gin—fined $200.

Nov. 10, 1955—employee—remove whiskey from base—fined $200.

Nov. 16, 1955—contractor employee—put lewd films in mails—fined $300.

Dec. 8, 1955—contractor employee—sell whiskey to enlisted men—fined $150.

Dec. 8, 1955—contractor employee—sell whiskey to enlisted men—fined $100.

April 30, 1956—contractor employee—drunk and disorderly in station—fined $25.

Special Court Martial

Jan., 1953—employee—refused to obey orders (quit job and fled to United States prior to trial).

June 14, 1954—contractor employee—assault with intent to commit grevious bodily harm—fined $250 and confined at hard labor for two months.

General Court Martial

July 22, 1953—contractor employee—three specifications assault and one specification sodomy—fined $750 and confinement at hard labor for three months (confinement at hard labor remitted).

APPENDIX C

The United Kingdom's Army Act, 1955 (3 & 4 Eliz. 2, Ch. 18) is analogous to the Uniform Code of Military Justice. The section specifying the civilians who should be subject to its terms in peacetime[1] is the Fifth Schedule, which is reprinted below.

Fifth Schedule

Civilians outside the United Kingdom subject to Part II when not on active service

1. Persons serving Her Majesty, or otherwise employed, in such capacities connected with Her Majesty's naval, military or air forces as may be specified for the purposes of this Schedule by regulations of the Army Council, being persons serving or employed under Her Majesty's Government in the United Kingdom.

2. Persons who are employed by, or in the service of, any naval, military or air-force organisation so specified to which Her Majesty's Government in the United Kingdom is a party and are employed by or in the service of that organisation by reason of that Government being a party thereto.

3. Persons belonging to or employed by any other organisation so specified which operates in connection with Her Majesty's naval, military or air forces.

4. Persons who, for the purposes of their profession or employment, are attached to or

[1] The term "not on active service" used in the heading of the text means, in effect, during time of peace in areas where no emergency has been declared. See Sec. 224 of the Army Act, 1955.

accompany any of Her Majesty's naval, military or air forces in pursuance of an authorisation granted by or on behalf of the Admiralty, the Army Council or the Air Council.

5. Persons forming part of the family of members of any of Her Majesty's naval, military or air forces and residing with them or about to reside or departing after residing with them.

6. Persons forming part of the family of persons falling within paragraphs 1 to 4 of this Schedule and residing with them or about to reside or departing after residing with them.

7. Persons employed by members of any of Her Majesty's naval, military or air forces.

8. Persons employed by persons falling within paragraphs 1 to 6 of this Schedule.

9. Persons forming part of the family of persons falling within either of the last two foregoing paragraphs and residing with them or about to reside or departing after residing with them.